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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 555

HARRY F. SINCLAIR, *Appellant*,

vs.

THE UNITED STATES OF AMERICA

On Certificate from the Court of Appeals of the District of Columbia.

BRIEF OF APPELLANT

Statement of the Case.

Harry F. Sinclair was indicted in the Supreme Court of the District of Columbia for a violation of the provisions of Section 102, R. S. U. S., (T. 2, Sec. 192, U. S. C. A.) which provides as follows:

> "Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any Committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed

> guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months."

The attention of the Senate of the United States was directed to certain leases of oil reserve lands in California and Wyoming, and to alleged fraud and irregularities in connection with the granting of said leases. The lease in Wyoming had been made between the Secretary of the Interior and the Secretary of the Navy, acting on behalf of the United States, and certain companies represented by the defendant Sinclair. The Senate on April 29, 1922, adopted Senate Resolution No. 282, authorizing its Committee on Public Lands and Surveys

> "to investigate this entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the Senate." (R. 1-2.)

This resolution was amended on June 5, 1922, by Senate Resolution No. 294, authorizing the Committee

> "to require the attendance of witnesses by subpoenas or otherwise; to require the production of books, papers, and documents; and to employ counsel, experts, and other assistants, and stenographers, at a cost not exceeding $1.25 per printed page. The chairman of the committee, or any member thereof, may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said Com-

> mittee, or any subcommittee thereof, who refuses or fails to obey the process of said Committee or appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law." (R. 2.)

On February 5, 1923, by Senate Resolution No. 434, Senate Resolution No. 282, agreed to April 21, 1922, and Senate Resolution No. 292, agreed to May 15, 1922, were "continued in full force and effect until the end of the Sixty-eighth Congress, and until otherwise ordered by the Senate."

On February 7, 1924, by Senate Resolution No. 147, the Committee was further authorized

> "to investigate this entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and to the preservation of its natural resources, and to ascertain what, if any, other or additional legislation may be advisable, and to report its findings and recommendations to the Senate." (R. 2.)

This resolution vested the Committee with the same authority in respect of subpoenaing witnesses and employing counsel, and administering oaths to witnesses as was provided in Resolution No. 294.

On February 8, 1924, Senate Joint Resolution No. 54 was adopted in which it was asserted in effect that from the evidence taken by the Committee it appeared that the leases executed by Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, of Naval Reserve No. 3 in Wyoming (Teapot Dome) to the Mammoth Oil Company acting through Harry F. Sin-

clair as its president, and of Naval Reserve No. 1 in the State of California to the Pan American Petroleum Company "were executed under circumstances indicating fraud and corruption." After asserting that the leases were executed without authority and "in defiance of the settled policy of the Government, adhered to through three successive administrations, to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy in any emergency threatening the national security," it was resolved that the leases were against public interest and that the land should be recovered. The President was accordingly authorized to cause suits to be instituted for the annulment and cancellation of the leases and to direct the institution of such criminal proceedings "as may be warranted by the facts in relation to the making of the said leases and contract." The President was authorized to appoint competent attorneys, by and with the advice and consent of the Senate, to prosecute any cases so instituted. Counsel were so appointed, and a bill in equity was filed in the United States District Court for the District of Wyoming to annul the lease to the Mammoth Oil Company, and a special Grand Jury was summoned in the District of Columbia to investigate the matter and prefer such charges as it might deem proper.

Mr. Sinclair was summoned on March 19, 1924, to appear before the Senate Committee on Public Lands and Surveys for the purpose of giving testimony and producing papers. When he appeared before the Committee he made a statement which showed that in January of 1923 he had been called before the Manufacturers Committee of the Senate and had produced all books and papers called for and testified fully regarding the lease of Teapot Dome and the organization of the Mammoth Oil Company, which held that lease; that on October 28,

1923, he was called by the Committee on Public Lands and Surveys of the United States Senate and answered all questions put to him by said Committee with respect to the lease of Teapot Dome, the organization of the Mammoth Oil Company and was excused; that in the afternoon of the same day he was recalled and answered all questions put to him by said Committee and was again excused; that following that, on December 4, 1923, he was called again before the same Committee and answered all questions put to him and produced his Auditor who also testified; that he was requested to furnish the Committee with certain papers and memoranda, which he promptly did; that on December 27, 1923, he was again called before the Committee and answered all questions put to him and produced all books and papers asked for by the Committee; that he was then excused until the fourth of January, 1924, on which date he again appeared before said Committee and answered all questions put to him and produced all books and papers asked for and was finally excused from further attendance. That he had been before the Committee at five different sessions and answered all questions and produced all books and papers called for and was finally excused from further attendance.

The statement further showed that when he had appeared at these various times before said Committee and answered their questions and produced books and papers called for the Committee was acting under Senate Resolution 282, of the Sixty-seventh Congress, which authorized it:

> "To investigate the entire subject of leases upon naval oil reserves with particular reference to the protection of the rights and equities of the United States and the preservation of its natural resources." (R. 4.)

That since his last appearance before said Committee the Senate and House had passed Senate Joint Resolution No. 54, which had been signed by the President, and that resolution was made a part of the statement. The resolution, in effect, denounces the lease between the Government and the Mammoth Oil Company, of which Mr. Sinclair was President, as void because of fraud and corruption and for want of lawful authority on the part of the Secretary of the Navy and the Secretary of the Interior to execute it. The resolution further asserted that the lease of Teapot Dome was made "in defiance of the settled policy of the Government, adhered to through three successive administrations, to maintain in the ground a great reserve supply of oil, adequate to the needs of the Navy in any emergency threatening the national security;" and that the lease was "against the public interest and the lands embraced therein should be recovered and held for the purpose to which they were dedicated."

The said Joint Resolution further provided:

> "That the President of the United States be, and he hereby is, authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of the said leases and contract and all contracts incidental or supplemental thereto; to enjoin the further extraction of oil from the said reserves under said leases or from the territory covered by the same, to secure any further appropriate incidental relief and to prosecute such other actions or proceedings, civil and criminal, as may be warranted by the facts in relation to the making of said leases and contract." (R. 5.)

The said Joint Resolution further authorized and directed the President to employ special counsel to prosecute such litigation, and the statement further showed that a resolution introduced into the House provided for the appropriation of $100,000 to cover the expenses of said litigation.

The statement of the appellant Sinclair before the said Committee further showed that the President, by and with the advice of the Senate, had appointed counsel, who were duly qualified as Special Counsel to the Government, authorized by said Senate Joint Resolution No. 54, and the said counsel by bill of complaint in the District Court of the United States for the District of Wyoming, had sued the Mammoth Oil Company, the holder of the lease, the Sinclair Crude Oil Purchasing Company and the Sinclair Pipeline Company and applied for relief by temporary injunction and receivers, which was granted.

The statement of the appellant Sinclair before said Committee further showed that in said bill of complaint it was charged in paragraph 28 that

> "In negotiating and concluding said agreement said Albert B. Fall and said Harry F. Sinclair, acting for and on behalf of the defendant Mammoth Oil Company, did fraudulently and covinously combine, confederate and conspire, in the manner and in the acts hereinabove set forth and other matters and things, to defraud the United States of America:
>
> "(a) By granting said lease upon said naval petroleum lands in violation of law;
>
> "(b) To favor and prefer said defendant Mammoth Oil Company over and above other persons desirous of taking lease upon said lands;

"(c) To insure to said defendant Mammoth Oil Company the valuable right to receive and take to exhaustion all of the oil and gas which might be obtained from said lands in said agreement mentioned;

"(d) To lease the said lands to said defendant Mammoth Oil Company by said agreement at an inadequate, improper and fraudulent consideration." (R. 6.)

And the statement of the appellant Sinclair before the said Committee further showed that the Special Counsel for the Government had made an official announcement that application had been made for the organization of a Special Grand Jury in the District of Columbia, for the purpose of inquiring into offenses and crimes growing out of the circumstances attending the execution of this lease.

The statement of the appellant Sinclair before said Committee respectfully represented to the said Committee that they were without any jurisdiction to question him further regarding the procurement of the lease or the validity thereof or any fact or circumstance pertaining thereto, because Congress by said Joint Resolution No. 54, duly passed and signed by the President, had made of the whole matter a judicial question, determinable solely by the courts of the country.

This statement in full is certified by the Court of Appeals of the District of Columbia in the Record herein. (R. 3-7.)

It further appears that after the appellant Sinclair had made said statement to the Committee a motion was made to proceed with the examination of Mr. Sinclair, whereupon Senator Bursum offered an amendment providing that the "examination shall not relate to any mat-

ter now pending in the Federal court in which case Mr. Sinclair may be a defendant." This led to the following discussion in the Committee:

> "Senator Dill: Mr. Chairman, that is the same thing as saying that he shall not be called, because the Committee has no interest in anything except the cases before the Court.
>
> "Senator Bursum: Not necessarily. We may have other questions. The Senator from Montana referred yesterday to pending legislation. There may be other matters. I do not mean to say that Mr. Sinclair is disqualified as a witness on matters relating to pending legislation.
>
> "Senator Dill: No; but they touch naval oil reserves and the leasing of reserves, and that certainly touched this case.
>
> "Senator Bursum: If they are pending in court, it seems to me that there ought not to be two courts.
>
> "Senator Walsh of Montana: I stated yesterday, Mr. Chairman, and nobody has undertaken to contradict it, that there is no rule of law in any court which excuses a man from testifying because of matters involved in some litigation pending elsewhere.
>
> "Senator Bursum: It is not pending elsewhere. It is only pending in one place. It is pending in the Federal court.
>
> "Senator Walsh of Montana: That is elsewhere. That is some litigation somewhere else, not right before this Committee. A man is never excused from testifying in one court because he has litigation involving the same matter in some other court.

"Senator Spencer: I think Senator Walsh is entirely right about that.

"Senator Bursum: I would not construe this Committee as a court, however.

"Senator Spencer: I think Senator Walsh is entirely right about that. As to any question of right, the point of the Senator from New Mexico, as I gather it, would not apply to the right of the witness to be excused because he had a case pending. If it had any materiality, it would apply to our sense of fairness in trying to get from him facts in connection with matters in which he was already being sued at our instance, but he has no right to claim exemption from our examination merely because he had a case pending. I suggest, Mr. Chairman, that the witness be called, and the matter come up when the questions are asked.

"The Chairman: Will you state your motion again, Senator Bursum?

"Senator Bursum: My motion was that in the examination the inquiry shall not relate to pending controversies before any of the Federal courts in which Mr. Sinclair is a defendant, and which questions would involve his defense.

"Senator Dill: Mr. Chairman, before that motion is put, if that motion is carried, does that preclude questions regarding the Mammoth Oil Co. and the Sinclair companies and the handling of their stocks and the transactions in connection with them?

"Senator Bursum: Well, it relates to the case.

"Senator Dill: Then, we should vote this question down.

"Senator Walsh of Montana: Of course we will vote it down. It is the same thing as the general proposition. If we do not examine Mr.

> Sinclair about these matters, there is not anything else to examine him about. Then I have not anything else that I want to examine him about." (R. 8-9.)

The amendment of Senator Bursum was voted down.

Several questions were then put to Mr. Sinclair, alleged in the indictment to have been pertinent to the matters and questions then and there under inquiry before the Committee, which he refused to answer.

The matter of his contumacy was referred to the United States District Attorney for the District of Columbia; and upon presentation to the Grand Jury an indictment was returned in ten counts covering ten separate questions which had been asked by the Committee and which the defendant had refused to answer. The defendant was convicted on the first, fourth, fifth and ninth counts.

In the first count, after setting out the various resolutions of the Senate and reviewing the proceedings which led up to the inquiry of March 22, 1924, defendant is charged with refusal to answer the following question:

> "Senator Walsh: Mr. Sinclair, I desire to interrogate you about a matter concerning which the committee had no knowledge or reliable information at any time when you had heretofore appeared before the committee and with respect to which you must then have had knowledge. I refer to the testimony given by Mr. Bonfils concerning a contract that you made with him touching the Teapot Dome. I wish you would tell us about that." (R. 9-10.)

By way of innuendo it is then alleged:

> "Said Hon. Thomas J. Walsh thereby meaning and intending, as said Harry F. Sinclair then

and there knew and understood, to elicit from him the said Harry F. Sinclair, facts, which then were within his knowledge, touching the execution and delivery of a certain contract bearing date September 25, 1922, made and executed by and between said Mammoth Oil Company, one F. G. Bonfils and one John Leo Stack, which was executed on behalf of said Mammoth Oil Company by said Harry F. Sinclair as President of said Mammoth Oil Company, and which, among other things, provided for the payment, by said Mammoth Oil Company, unto said F. G. Bonfils and said John Leo Stack, of the sum of $250,000.00, on or before October 15, 1922, in consideration of the lease, by said F. G. Bonfils and said John Leo Stack, of rights to lands described in said Executive Order of April 30, 1915, and embraced in the aforesaid lease of April 7, 1922."

In the fourth count defendant is charged with refusal to answer the following question:

> "Senator Walsh of Montana: Since you were on the stand last Mr. John C. Shaffer told us about an agreement between yourself and Secretary Fall, under which Mr. Shaffer was to receive from you a certain portion of the territory covered by the lease which you secured for the Mammoth Oil Company. Will you tell us about that matter?" (R. 10.)

By way of innuendo it is alleged:

> "Said Hon. Thomas F. Walsh thereby meaning and intending, as said Harry F. Sinclair then and there well knew and understood, to elicit from

him the said Harry F. Sinclair facts which then were within his knowledge touching the making of a certain oral agreement whereby one Albert B. Fall, then Secretary of the Interior of the United States, covenanted and agreed with said Harry F. Sinclair that a lease then under negotiation by said Harry F. Sinclair with the said Albert B. Fall as such Secretary for the lands mentioned in said Executive Order of April 30, 1915, would be leased to the said Mammoth Oil Company only upon the condition that he the said Harry F. Sinclair would covenant and agree to set aside certain of the leased lands for the benefit of one John C. Schaffer, who was the person referred to in the said question, which said question in this count of this indictment mentioned then and there, as said Harry F. Sinclair then well knew, was a question pertinent to said matters and questions then and there under inquiry before said Committee as in said first count aforesaid."

In the fifth count of the indictment defendant is charged with the refusal to answer the following question:

> "Senator Walsh of Montana: Mr. Sinclair, will you tell the committee where and when you met Secretary Fall during the months of November and December last?" (R. 11.)

By way of innuendo it is alleged:

> "Said Hon. Thomas J. Walsh thereby meaning and intending, as said Harry F. Sinclair then and there well knew and understood, to elicit from

him the said Harry F. Sinclair facts which then were within his knowledge touching conferences theretofore had between said Harry F. Sinclair and said Albert B. Fall, who had been Secretary of the Interior of the United States, who had been a witness before the said Committee and had testified to certain facts, the truth whereof the said Committee was desirous to establish in the determination of further facts touching the execution and delivery of the said lease of April 7, 1922, for the lands mentioned in the said Executive Order of April 30, 1915; which said question in this count of this indictment mentioned then and there, as said Harry F. Sinclair then well knew, was a question pertinent to said matters and questions then and there under inquiry before said Committee as in said first count aforesaid."

In the ninth count of the indictment defendant is charged with the refusal to answer the following question:

"Senator Adams: Mr. Sinclair, I believe in an earlier hearing you testified, in answer to a question, that you had in no way, and none of your companies had in any way, given or loaned anything to Secretary Fall. Is that correct?" (R. 12.)

By way of innuendo it is then alleged:

"Said. Hon. Alva B. Adams thereby meaning and intending, as said Harry F. Sinclair then and there well knew and understood, to elicit from him the said Harry F. Sinclair facts which then were within his knowledge touching the circumstances under which said lease of April 7, 1922,

had been made, and the question whether any improper or unlawful means or influence had been used in the procurement of that lease; which said question in this count of this indictment mentioned then and there, as said Harry F. Sinclair then well knew, was a question pertinent to said matters and questions then and there under inquiry before said Committee as in said first count aforesaid."

The Trial Court, in submitting the case to the jury, instructed as follows:

> "You have got to decide these four questions. Whether Sinclair was summoned as a matter of fact, whether he appeared as a matter of fact, in Washington; whether he was sworn as a matter of fact, whether he was asked these questions and refused to answer them you are concerned only with the matters of fact that are involved in those questions. Did he in New York get the command of the Senate Committee to appear here as a matter of fact? Did he appear here? When he appeared, did one of the Senators—I have forgotten which one—or some officers of that Committee administer to him an oath? And did he then and there proceed to give certain testimony, and later when he was recalled again refuse to give certain testimony?" (R. 12.)

The jury returned a verdict of guilty, and defendant was sentenced to pay a fine of $500, and to imprisonment in the Washington Asylum and Jail for the period of three months.

Appellant Sinclair brought the judgment of conviction to the Court of Appeals of the District of Columbia

and the cause is now pending in that court. That court, under the provisions of Section 239 (T. 28, Sec. 346, U. S. C. A.) of the United States Judicial Code, certified for the decision of this Court the following questions of law:

Question No. 1.

May a witness summoned before a committee of Congress to testify in an inquiry being conducted in aid of legislation lawfully refuse to answer questions which call for the disclosure of the private affairs of the witness? (R. 13.)

Question No. 2.

May such a witness refuse to answer questions directed to matters wherein relief or redress could be had only by a judicial proceeding?

Question No. 3.

Would a witness, if it appears that the inquiry, though authorized in aid of legislation, is in fact directed to matters which have been referred by Congress to the courts, and in which relief or redress can be had only by a judicial proceeding, and in which proceeding the witness is a defendant, be justified in refusing to answer questions directed to the matters so referred and pending in the courts?

Question No. 4.

Was the issue of the pertinency to the questions propounded to Mr. Sinclair to the investigation being conducted by the Committee of the Senate a mixed question

of law and fact for the determination of the Court and Jury, or was it solely a question of law?

Question No. 5.

May a witness, who is alleged to have been a party to a conspiracy to defraud the United States through certain contracts and against whom judicial proceedings have been instituted, refuse to answer questions propounded by a duly authorized Senate Committee insofar as the questions involve the connection of the witness with the contracts forming the basis of the judicial proceeding? (R. 13.)

ARGUMENT

Point I.

The Questions Propounded to Mr. Sinclair Called for Testimony relating solely to His Private Business, and the Committee Had No Jurisdiction to Make Such an Inquiry and the Witness Rightfully Refused to Answer the Questions.

It was settled by the decision in the case of *Kilbourn* v. *Thompson*, 103 U. S. 168, that neither House of Congress possesses a "general power of making inquiry into the private affairs of the citizen;" that the power actually possessed is limited to inquiries relating to matters of which the particular House "has jurisdiction" and in respect of which it rightfully may take other action; that if the inquiry relates to "a matter wherein relief or redress could be had only by a judicial proceeding" it is not within the range of this power, but must

be left to the courts, conformably to the constitutional separation of governmental powers.

McGrain v. *Daugherty*, 273 U. S. 135.

In the case of *McGrain* v. *Daugherty*, *supra*, the Court said, (p. 154), that the two principal questions involved were:

> "(a) Whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power through its own process to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution, and
>
> "(b) Whether it sufficiently appears that the process was being employed in this instance to obtain testimony for that purpose."

There was no question raised with respect to an inquiry into the private affairs of the witness who had refused to appear. Indeed there could have been none, because he had not appeared and no questions had been asked him; so that the case of *McGrain* v. *Daugherty* does not answer or suggest an answer to the question certified by the Court of Appeals herein:

> "May a witness summoned before a committee of Congress to testify in an inquiry being conducted in aid of legislation lawfully refuse to answer questions which call for the disclosure of the private affairs of the witness?" (R. 13.)

This precise question has not been fully answered by any decision of this Court.

In the case of *Kilbourn* v. *Thompson, supra,* it was definitely decided that neither House "possesses the general power of making inquiry into the private affairs of the citizen." The question here presented is whether, while engaged in an inquiry conducted in aid of legislation a committee of Congress may compel a witness to disclose his private affairs.

In *Re Pacific Railway Commission,* 32 Fed. 241, Mr. Justice FIELD, speaking for the Court, said, (p. 250):

> "It (Congress) may inquire into the extent of the productions of the country of every kind, natural and artificial, and seek information as to the habits, business and even amusements of the people. But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters. In the pursuit of knowledge it cannot compel the production of the private books, and papers of the citizen for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases only upon averments that its rights are in some way dependent for enforcement upon the evidence those books and papers contain."

In the case of *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, commenting upon the powers of Congress, this Court said, (p. 478):

> "In accomplishing the objects of a power granted to it Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution.

> We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen."

In the case of *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, this Court, in limiting the powers of the Interstate Commerce Commission concerning compulsory testimony in inquiries relating to specifically alleged breaches of the statutes, said, (p. 419):

> "the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary,—those where the investigations concern a specific breach of the law."

In that case the Court further said, (p. 421):

> "We could not believe, on the strength of other than explicit and unmistakable words, that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed."

In *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, the Court said, (p. 444):

> "The appellant's refusal to answer the series of questions put was not based upon any objec-

tion to giving much of the information sought, but on the ground that the counsel who put them avowed that they were the beginning of an attempt to go into the whole business of the Armour lines,—a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up. This was beyond the powers of the Commission."

In the case of *Federal Trade Commission* v. *P. Lorillard Tobacco Co.*, 264 U. S. 298, where it was contended that the Commission had unlimited power to compel testimony, notwithstanding it was not proceeding in its quasi-judicial capacity, this Court said, (p. 305):

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire. (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

Kilbourn v. *Thompson*, 103 U. S. 168;
McGrain v. *Daugherty*, 272 U. S. 135;
Re Pacific Railway Commission, 32 Fed. 241;
Interstate Commerce Commission v. *Brimson*, 154 U. S. 447;
Harriman v. *Interstate Commerce Commission*, 211 U. S. 407;
Ellis v. *Interstate Commerce Commission*, 237 U. S. 434;
Federal Trade Commission v. *P. Lorillard Tobacco Co.*, 264 U. S. 298.

Point II.

The Questions Propounded to Mr. Sinclair Called for Testimony Relating Solely to Matters Cognizable Alone by the Courts, Which Were at the Time Pending in the Courts, and the Committee Had No Jurisdiction to Inquire Into Such Matters Wherein Relief or Redress Could Be Had Only in a Judicial Proceeding, and the Witness Rightfully Refused to Answer Such Questions.

Question No. 2, certified by the Court of Appeals of the District of Columbia, is:

> "May such a witness refuse to answer questions directed to matters wherein relief or redress could be had only by a judicial proceeding?" (R. 13.)

We may be permitted to again call attention to the fact that the case of *McGrain* v. *Daugherty*, *supra*, did not present this question. We are concerned here with the question as to whether a witness appearing before a Committee of Congress authorized to compel evidence

in an investigation conducted in aid of its legislative duties may rightfully refuse to answer questions concerning matters wherein relief or redress could be had only by judicial proceeding. This assumes that the Committee of Congress is duly authorized to conduct the investigation, that the witness is properly before the Committee and legally bound to answer questions propounded by the Committee relating to the matters of which the Committee has jurisdiction, and that the Committee, departing from the matters to which its inquiry is confined by constitutional limitation, asked questions of the witness concerning matters as to which relief or redress could only be had in a judicial proceeding.

It is clear from the case of *Kilbourn* v. *Thompson*, *supra*, (p. 193), that "if the investigation which the Committee was directed to make was judicial in its character and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding," it would be without jurisdiction. The question here is: If the investigation the Committee was directed to make was legislative in its character but the Committee departed from the legislative limitation and propounded questions concerning matters "wherein relief or redress could be had only by a judicial proceeding," could the witness, because of such departure, rightfully refuse to answer the questions? Since the refusal to answer may subject the witness to indictment and prosecution, it would seem that the questions which he refused to answer must be clearly within the constitutional power of the Committee, as well as pertinent to the matters being investigated under that power.

Indeed in the very recent case of *McGrain* v. *Daugherty*, *supra*, this Court said, (p. 176):

> "it is a necessary deduction from the decisions in *Kilbourn* v. *Thompson* and *Re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

Point III.

Even Though the Committee Were Authorized to Make an Investigation in Aid of Legislation, the Questions Propounded to Mr. Sinclair Inherently Disclose, and the Colloquy in the Committee Conclusively Establishes, That It Had Avowedly Departed From Any Inquiry in Aid of Legislation and was Seeking Information Upon Matters Which Had Been Referred to the Courts, Where Alone Relief or Redress Could Be Had and Where the Witness Was a Defendant; and Therefore the Committee Had No Jurisdiction of the Matters Covered by the Questions and the Witness Rightfully Refused to Answer.

Question No. 3 certified by the Court of Appeals of the District of Columbia, is:

> "Would a witness, if it appears that the inquiry, though authorized in aid of legislation, is in fact directed to matters which have been referred by Congress to the courts, and in which relief or redress can be had only by a judicial proceeding, and in which proceeding the witness is a defendant, be justified in refusing to answer questions directed to the matters so referred and pending in the courts?" (R. 13.)

It appears from the Record herein, (pp. 3-4), that Mr. Sinclair was summoned to appear before the Senate Committee on Public Lands and Surveys for the purpose of giving testimony and producing papers on March 19, 1924; that when he appeared he made a statement to the Committee, the accuracy of which is not questioned. In this statement Mr. Sinclair said that he had been called before the Manufacturers Committee in January of 1923, and in response to said summons had produced all books and papers called for and testified fully regarding the lease of Teapot Dome and the organization of the Mammoth Oil Company, which held that lease; that on October 28, 1923, he was called before the Committee on Public Lands and Surveys and answered all questions propounded to him in respect to the lease of Teapot Dome and the organization of the Mammoth Oil Company and was excused; that in the afternoon of the same day he was recalled and answered all questions put to him by the Committee and was again excused; that on December 4, 1923, he was again summoned by the Committee and answered all questions put to him and had his Auditor present who also testified; that he was requested to furnish the Committee with certain papers and memoranda, which was accordingly done; that on December 27, 1923, he was again summoned before the Committee and answered all questions put to him and produced all books and papers asked for by the Committee; that he was then excused until the fourth of January, 1924, on which date he again appeared and answered all questions put to him by the Committee and produced all books and papers called for, and on that day was finally excused from further attendance.

The witness further said that when he appeared before the Committee at the dates given above and answered their questions and produced all books and pa-

pers asked for, the Committee was acting under Senate Resolution 282, of the Sixty-seventh Congress, which authorized it

> "To investigate the entire subject of leases upon Naval oil reserves with particular reference to the protection of the rights and equities of the United States and the preservation of its natural resources;"

and that since his last appearance before the Committee, and at the instance of the Committee, the Senate and House had passed Joint Resolution No. 54, which had been signed by the President, and he made that Resolution a part of his statement to the Committee.

That Resolution, in effect, denounced the lease between the Government and the Mammoth Oil Company, of which Mr. Sinclair was President, as void because of fraud and corruption and for want of lawful authority on the part of the Secretary of the Navy and the Secretary of the Interior to execute it. Mr. Sinclair called the attention of the Committee to the fact that this was an assertion under the rights and equities of the United States referred to in the Resolution under which the Committee was conducting the investigation, that the land covered by the lease of Teapot Dome belonged to the United States; that the Resolution further asserted that the lease was made "in defiance of the settled policy of the Government, adhered to through three successive administrations, to maintain in the ground a great reserve supply of oil, adequate to the needs of the Navy, in any emergency threatening the national security." Mr. Sinclair pointed out that this was an outline of the policy of the Government with respect to the "preservation of its natural resources," referred to in the Res-

olution under which the Committee was conducting the investigation.

Mr. Sinclair further pointed out to the Committee that Senate Resolution 54 provided:

> "That the President of the United States be, and he hereby is, authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of the said leases and contract and all contracts incidental or supplemental thereto; to enjoin the further extraction of oil from the said reserves under said leases or from the territory covered by the same; to secure any further appropriate incidental relief; and to prosecute such other actions or proceedings, civil and criminal, as may be warranted by the facts in relation to the making of said leases and contract." (R. 5.)

And that the President was authorized to employ counsel to prosecute such litigation, and that in another resolution initiated in the House, $100,000 was appropriated to cover the expenses of such litigation.

Mr. Sinclair called the attention of the Committee to the fact that the President, by and with the advice and consent of the Senate, had appointed counsel, who were duly sworn and took their oaths of office as Special Counsel to the Government authorized by said Senate Joint Resolution No. 54, and that the said counsel by bill of complaint in the District Court of the United States for the District of Wyoming, sued the Mammoth Oil Company, the holder of the lease, the Sinclair Crude Oil Purchasing Company and the Sinclair Pipeline Company and applied for relief by temporary injunction and receivers, which was granted.

He further called the attention of the Committee to the fact that in the bill of complaint it was charged that:

> "In negotiating and concluding said agreement said Albert B. Fall and said Harry F. Sinclair, acting for and on behalf of the defendant Mammoth Oil Company, did fraudulently and covinously combine, confederate and conspire, in the manner and in the acts hereinabove set forth and other matters and things, to defraud the United States of America:
>
> "(a) By granting said lease upon said naval petroleum lands in violation of law;
>
> "(b) To favor and prefer said defendant Mammoth Oil Company over and above other persons desirous of taking lease upon said lands;
>
> "(c) To insure to said defendant Mammoth Oil Company the valuable right to receive and take to exhaustion all of the oil and gas which might be obtained from said lands in said agreement mentioned;
>
> "(d) To lease the said lands to said defendant Mammoth Oil Company by said agreement at an inadequate, improper and fraudulent consideration." (R. 6.)

Mr. Sinclair further called the attention of the Committee to the fact that the Special Counsel acting for the Government had announced officially that application had been made for the organization of a special Grand Jury in the District of Columbia, for the purpose of inquiring into offenses and crimes growing out of the circumstances attending the execution of this lease.

Mr. Sinclair then respectfully submitted to the Committee that:

"It is perfectly clear, therefore, from the language of the resolution that your Committee by reason of any constitutional power which it may possess or by virtue of the resolution under which it is acting is not now engaged, nor could it be engaged in an investigation 'with particular reference to the protection of the rights and equities of the United States and the preservation of its natural resources;' because the Senate, from whom you derive your authority, has unanimously passed upon all questions embraced within that authorization and exhausted whatever power or authority it had in the premises." (R. 6.)

He further submitted to the Committee that:

"It is further perfectly clear that the Congress and the President have made of the whole matter a judicial question, determinable solely by the courts of the country, and such question is now actually pending in the District Court of the United States for the District of Wyoming and whatever criminal act is claimed is about to be investigated by a Special Grand Jury of the District of Columbia." (R. 6-7.)

He further said:

"With due respect to your Committee, I claim that you are without any jurisdiction to question me further regarding the procurement of the lease or the validity thereof or any fact or circumstance pertaining thereto; that such an examination of me by your committee would not only be clearly outside of your jurisdiction but would be, in effect, an examination before trial in a civil

action between the Government and the Company I represent, by a body of men wholly unauthorized by law and in a wholly unauthorized manner. Or, if your examination should be directed toward eliciting facts concerning fraud or corruption your Committee in effect would have constituted itself a grand jury as to a matter which Congress and the President, by Joint Resolution No. 54, have directed should be presented to the constitutional authorities of the country." (R. 7.)

Upon the completion of Mr. Sinclair's statement to the Committee, a motion was made to proceed with the examination of Mr. Sinclair, and Senator Bursum offered an amendment providing that the "examination shall not relate to any matter now pending in the Federal court in which case Mr. Sinclair may be a defendant." This motion led to a discussion. This discussion is set out in full in the Record. The concluding part of the colloquy in the Committee is as follows:

"The Chairman: Will you state your motion again, Senator Bursum?

"Senator Bursum: My motion was that in the examination the inquiry shall not relate to pending controversies before any of the Federal courts in which Mr. Sinclair is a defendant, and which questions would involve his defense.

"Senator Dill: Mr. Chairman, before that motion is put, if that motion is carried, does not that preclude questions regarding the Mammoth Oil Co. and the Sinclair companies and the handling of their stocks and the transactions in connection with them?

"Senator Bursum: Well, it relates to the case.

"Senator Dill: Then, we should vote this question down.

"Senator Walsh of Montana: Of course we will vote it down. It is the same thing as the general proposition. If we do not examine Mr. Sinclair about these matters, there is not anything else to examine him about. Then I have not anything else that I want to examine him about." (R. 9.)

An examination of the questions which were thereafter put to Mr. Sinclair and for the refusal to answer which he has been convicted, taken in connection with the innuendos showing the purposes of such questions, incontestibly establishes that by no conceivable interpretation could they relate to anything except the matters which had been by Senate Joint Resolution 54 referred to the courts and of which the courts had taken jurisdiction.

From this narrative of events which took place before the Committee, it is clear:

1. That Mr. Sinclair had, on repeated occasions, obeyed the summonses of the Committee, appeared before it, testified fully and produced all books and papers required;

2. That he never declined to testify or to produce books and papers until summoned on March 19, 1924, though he had been in attendance upon said Committee from time to time since October, 1923; and that he rested his declination to testify upon the ground that the Committee was without jurisdiction to inquire into the matters attending the execution of the lease of Teapot Dome and directly affecting the validity of said lease because Congress, by Senate Joint Resolution 54, had theretofore referred all of such matters to the courts, civil and criminal, wherein relief or redress alone could be had.

Moreover, we are not left in any doubt nor need we resort to any conjecture as to the matters about which the Committee intended to inquire, for in the presence of Mr. Sinclair and before the questions had been propounded to him, and after the discussion of a motion made by Senator Bursum to confine the inquiry to the constitutional legislative function of the Committee, and not push the inquiry over and into those matters which Congress had referred to the courts and over which the courts had taken jurisdiction, and clearly outside of the jurisdiction of the Committee, Senator Walsh announced:

> "If we do not examine Mr. Sinclair about these matters" (meaning the matters which had just been discussed, which were involved in the case brought by the Government of the United States against the Mammoth Oil Company) "there is not anything else to examine him about. Then I have not anything else that I want to examine him about." (R. 9.)

From this the witness had a clear right to conclude that Senator Walsh, as examiner for the Committee, it having voted down the Bursum motion, had no other purpose in questioning him than to probe into the questions involved in the litigation pending and impending between the United States Government and Mr. Sinclair or his companies.

We have a situation where a motion was made to confine the inquiry within the constitutional power of the Committee as it has been recognized in the case of *McGrain* v. *Daugherty, supra*, a prompt voting down of that motion and an unequivocal avowal by the authorized examiner on behalf of the Committee that he had

no other questions to ask upon any other subject than the subject of the litigation. If anything else were required to demonstrate that the Committee deliberately departed from its constitutional jurisdiction and deliberately entered upon an inquiry beyond the bounds of its power into matters already lodged with a co-ordinate branch of the Government for disposition, the questions themselves furnish that demonstration.

The resolution under which the Committee was acting, authorizing it

> "to investigate this entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the Senate." (R. 1-2.)

in and of itself required an investigation which was essentially judicial in so far as it related to the "rights and equities of the Government of the United States," under leases upon naval oil reserves. Senate Joint Resolution 54 fully comprehended the results of its inquiries with respect to the "rights and equities" of the Government of the United States under leases upon naval oil reserves, attempted to define the rights of the United States therein, characterized the procurement thereof, settled the future policy of the Government with respect to the maintenance of a reserve supply of oil in the ground, and finally determined that the whole question was a judicial one requiring the institution of proceedings, civil and criminal, in the courts.

In the case of *Kilbourn* v. *Thompson*, *supra*, the resolution adopted by the House authorizing the investigation recited in the preamble that "the courts are power-

less, by reason of said settlement to afford adequate redress to said creditors." In the case here presented the Congress, by Senate Joint Resolution 54, had not only been concluded that the "courts were powerless" but had recognized that only in the courts could adequate relief and redress be had, and had definitely sent the whole matter to the courts for such relief and redress. In *Kilbourn* v. *Thompson*, the Court said, (p. 194):

> "The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction?"

In the case here presented the matter had been, by an Act of Congress, sent to the court, was pending there, and we may ask, by way of paraphrase:

> What right had the Committee to inquire into matters pending in a court of competent jurisdiction?

Again the Court says, (p. 194), in the case of *Kilbourn* v. *Thompson*,

> "The case being one of a judicial nature, for which the power of the courts usually afford the only remedy, it may well be supposed that those powers were more appropriate and more efficient in aid of such relief than the powers which belong to a body whose function is exclusively legislative."

This Court, in the case of *McGrain* v. *Daugherty*, *supra*, said, (p. 175):

> "The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn* v. *Thompson* and *Re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

The case here presented falls naturally and directly within the declaration, "that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." There was and is no way provided by which a witness appearing before a committee of Congress may have the question of the power of the committee, or the pertinency of the questions propounded, determined judicially before he finally answers or declines to answer. Mr. Sinclair's declination in this case speedily resulted in his indictment and trial. It is reasonably certain if his right to refuse to answer the questions propounded as being in excess of the power of the Committee and not pertinent to the inquiry could have

been submitted to a court in advance, he would have been relieved of the obligation to answer.

In the case of *McGrain* v. *Daugherty, supra*, this Court said that the second important question involved therein was whether it sufficiently appeared that the process was being employed to obtain testimony to enable the committee to exercise a legislative function belonging to it under the Constitution. In that case, it will be recalled that the Court pointed out that the investigation was aimed at one of the great Departments of the Government, to-wit, the Department of Justice; that while the resolution did not in terms avow that it was intended in aid of legislation, it showed that the subject to be investigated was the administration of the Department of Justice and that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants were all subject to regulation by Congressional legislation, and the Department is maintained and its activities are carried on under appropriations provided by Congress from year to year. This Court was careful on that branch of the case to say, (p. 160):

> "we are not now concerned with the right of the Senate to propound or the duty of the witness to answer specific questions, for as yet no questions have been propounded to him. He is asserting—and is standing on his assertion—that the Senate is without power to interrogate him, even if the questions propounded be pertinent and otherwise legitimate—which for present purposes must be assumed."

This Court further said, (p. 178):

> "The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable."

In the case presented here there is no room for any presumption with respect to the intention of the Committee in propounding the questions nor in eliciting the information. There is no room for a presumption that the object of the questions was to elicit information to aid it in the discharge of a legislative duty, because a formal motion was made to confine the Committee inquiry into matters which would aid it in its legislative duties; the motion was discussed by the Committee and the colloquy and final conclusion of the Committee clearly disclose that the object of the Committee was to inquire into the facts and circumstances attending the making of the lease, the inquiry and appraisement of which had already been by an Act of Congress lodged with the courts.

At the very opening of the colloquy, Senator Dill, in discussing the motion made by Senator Bursum that the examination should not relate to any matter pending in the Federal courts, said:

> "Mr. Chairman, that is the same thing as saying that he shall not be called, because the Committee has no interest in anything except the cases before the court." (R. 8.)

Senator Walsh said:

> "If we do not examine Mr. Sinclair about these matters, there is not anything else to examine him about. Then I have not anything else that I want to examine him about." (R. 9.)

This court in *McGrain* v. *Daugherty, supra*, referring to the second resolution which directed that the witness Daugherty be attached, said, (p. 180):

> "The second resolution—the one directing that the witness be attached—declares that his testimony is sought with the purpose of obtaining 'information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.' This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of 'other action' if deemed 'necessary or proper' is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed."

In the case here presented we maintain that an inadmissible and unlawful object was affirmatively and definitely avowed. It is conceivable that a witness appearing be-

fore a Committee of Congress might be asked questions which, while directly relating to litigation pending in the courts, might at the same time bear upon some discernable contemplated legislation; but in the case here presented, if we take the unquestioned statement of Mr. Sinclair to the Committee which shows his many appearances and examinations between October, 1923, and March, 1924, with the production of his books and papers, which shows that prior to his appearance and declination to answer in March, 1924, the Congress had passed Senate Joint Resolution 54, referring all matters growing out of the lease of Teapot Dome to the courts, civil and criminal, for disposition; if we consider the colloquy between the members of the Committee, in the presence of Mr. Sinclair, and the decision of the Committee after the colloquy as to the line of inquiry intended and about to be proceeded with, and if we take the questions which followed and for the refusal to answer which Mr. Sinclair was convicted, the conclusion seems irresistable that the questions related to matters beyond the bounds of the Committee's power and that the purpose of the Committee in propounding the questions was affirmatively and definitely avowed.

Point IV.

The Pertinency of the Questions Propounded to Mr. Sinclair Was a Mixed Question of Fact and Law and Should Have Been Submitted to the Jury Under Appropriate Instructions From the Court.

As appears from the Record certified here from the Court of Appeals of the District of Columbia, the Trial Court, submitting the case to the jury, instructed as follows:

> "You have got to decide these four questions. Whether Sinclair was summoned as a matter of fact; whether he appeared as a matter of fact in Washington; whether he was sworn as a matter of fact, whether he was asked these questions and refused to answer them you are concerned only with the matters of fact that are involved in those questions. Did he in New York get the command of the Senate Committee to appear here as a matter of fact? Did he appear here? When he appeared, did one of the Senators—I have forgotten which one—or some officers of that Committee administer to him an oath? And did he then and there proceed to give certain testimony, and later when he was recalled again refuse to give certain testimony?" (R. 12.)

The fourth question certified by the Court of Appeals of the District of Columbia is:

> "Was the issue of the pertinency of the questions propounded to Mr. Sinclair to the investigation being conducted by the Committee of the Senate a mixed question of law and fact for the determination of the Court and Jury, or was it solely a question of law?" (R. 13.)

The charge of the Court we maintain was in violation of the Sixth Amendment to the Constitution, in that it denied the defendant the right of a trial by jury.

Whether the questions which the witness refused to answer "were pertinent to the question under inquiry" was the very essential ingredient of the crime charged, and this was withdrawn from the consideration of the jury and determined by the Court.

In the only cases which we have been able to find in which the direct question of pertinency under this statute (Sec. 102, R. S. U. S.) has been discussed, (*United States* v. *Searles and Shriver*, Washington Law Reporter, vol. 25, p. 384, (otherwise unreported) and ibid, p. 414), Mr. Justice BRADLEY, in an opinion directing the jury to return a verdict for the defendant in the Searles Case (supra) said, (p. 390):

> "There is nothing in the evidence that tends to show that these questions put were pertinent to the subject matter of the inquiry that the committee were making. It would seem, that, this being of the very essence of the charge upon which this criminal prosecution is based, the pertinency of the question should be made to appear affirmatively, and that the matter of its pertinency should not be dependent upon mere conjecture or speculation."

And further, (p. 390):

> "when he" (defendant) "is brought into a court of justice to respond to a criminal charge for refusing to answer a question that upon its face is apparently immaterial and impertinent, it should appear *affirmatively*, that other evidence was at hand, and could be produced, that was necessary to make the connection between the evidentiary fact and the ultimate fact, or, at least, that such evidence subsequently was obtained and produced."

He further held, (p. 391):

> "Under such circumstances, the pertinency of the questions to the subject-matter of the investi-

> gation, or, to use the language of Section 102, 'to the question under inquiry,' being absolutely and entirely wanting, it must be held that the defendant was under no obligation to answer them; * * *."

In the *Shriver* case, reported in Washington Law Reporter, vol. 25, p. 414 (otherwise unreported), in which Mr. Justice BRADLEY delivered an opinion directing the jury to return a verdict of not guilty under an indictment brought under the same statute as the one presented here, he held that the word "pertinent" was synonymous with "relevant" and declared, (p. 416):

> "'A fact is said to be relevant when it is so connected, directly or indirectly, with a fact in issue in an action or other proceeding, that evidence given respecting it may reasonably be expected to assist in proving or disproving the fact in issue.' 20 Am. & Eng. Encyc. L. 786."

Mr. Justice BRADLEY further said, (p. 416):

> "It was evidently the purpose of the Congress in the statute in question to limit the responsibility of witnesses summoned to testify in an investigation of charges, to answering such questions only as would elicit facts that would tend to prove or disprove the charges. If a Congressional committee sees fit to roam in the realm of collateral, irrelevant, immaterial, impertinent matters, the witness who refuses to accompany it will not be amenable to the penalties of this statute."

If we assume that a fact is pertinent only when it is so connected, directly or indirectly, with a fact in issue

that evidence given respecting it may reasonably be expected to assist in proving or disproving the fact in issue, then the question of pertinency is a question of fact, to be determined by logical reasoning and not by legal rules. Whether the facts called for by a question are so connected with other facts as to be of assistance in reaching a final conclusion is not a question of law. It is true that in a regular judicial proceeding the Court determines the pertinency or relevancy of evidence offered, that is whether it should be allowed to be considered by a jury; but when the question of its pertinency is the essential ingredient of the crime charged, we maintain that the question is one which must be submitted to a jury, along with all of the other facts in the case, to the end that the accused may be afforded a trial by jury under the Sixth Amendment of the essential ingredients of the crime charged.

In peremptorily withdrawing from the consideration of the jury the question of pertinency of the questions propounded to Mr. Sinclair, as is shown in the charge quoted under this point, the court obviously misconstrued the meaning of the language employed by Chief Justice Alvey in the case of Chapman v. U. S., 5 App. D. C., at p. 137, where he said "Whether the questions propounded by the committee or by the Senate were pertinent is a *judicial question*, and is an essential element of the offense charged." We think the court took this to mean that it was a question of law, for the court to determine. A "judicial question" means a question to be adjudicated in a court of justice, and that is all it does mean. It does not mean that it is a question of law to be decided by the court any more than it means a question of fact to be decided by the jury or a mixed question of fact and law which the court must, under

proper instructions, submit to the jury for determination; and, when Chief Justice ALVEY used that language in the Chapman case, supra, he meant to say this and only this:—that it was a judicial question to be determined in a court of justice, as distinguished from a legislative question to be determined by the legislative body.

In Thayer's Preliminary Treatise on Evidence, Part II, pp. 264-265, it is said:

> "Observe at this point, one or two fundamental conceptions. There is a principle—not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence, as contrasted with the old formal and mechanical systems—which forbids receiving anything irrelevant, not logically probative. How are we to know what these forbidden things are? Not by any rule of law. The law furnished no test of relevancy. For this, it tacitly refers to logic and general experience,—assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them."

See also, Jones' Commentaries on Ev., 2nd ed., p. 1086, et seq.

The court, in withdrawing from the jury the question of pertinency, withdrew from their consideration that which Chief Justice ALVEY determined was "an essential element of the offense charged," and required the jury to answer specific questions in the nature of a special verdict, which thereby in effect denied the defendant the right of trial by jury.

Point V.

Mr. Sinclair Was Charged by the Allegations of the Bill Filed by the United States Against the Mammoth Oil Company to Have Been a Party to a Conspiracy to Defraud the United States Through Certain Contracts, and a Special Grand Jury Had Been Summoned in the District of Columbia to Investigate the Same Matters and Prefer Such Charges As It Might Deem Proper; and He Was Justified in Refusing to Answer Questions Propounded by the Committee Involving His Connection With the Contracts Forming the Basis of These Proceedings, Civil and Criminal.

Question No. 5, certified by the Court of Appeals of the District of Columbia, is:

> "May a witness who is alleged to have been a party to a conspiracy to defraud the United States through certain contracts and against whom judicial proceedings have been instituted, refuse to answer questions propounded by a duly authorized Senate Committee insofar as the questions involve the connection of the witness with the contracts forming the basis of the judicial proceeding?" (R. 13.)

Having fully presented our views on the other questions certified by the Court of Appeals, which in large part comprehend the question involved in the Fifth Question certified, we deem it unnecessary to extend our argument under this point, and rest upon the argument on the other points in so far as they are applicable.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 555

HARRY F. SINCLAIR, *Appellant*,

vs.

THE UNITED STATES OF AMERICA

On Certificate from the Court of Appeals of the District of Columbia.

BRIEF OF APPELLANT, HARRY F. SINCLAIR

JURISDICTION

This cause is here for consideration by this Court pursuant to the order of this Court made under Section 239, Judicial Code, as amended (U. S. C. A., tit. 28, sec. 346), directing that the entire record be sent up by the Court of Appeals of the District of Columbia (R. 194), following a certification by that Court of five certain questions upon which it requested instructions by this Court. (R. 181-191.)

STATEMENT OF THE CASE

The appellant, Harry F. Sinclair, was tried and convicted in the Supreme Court of the District of Columbia upon an indictment which attempted to charge a violation of Section 102, R. S. U. S., and sentenced to imprisonment in the Washington Asylum and Jail for the

period of three months, and to pay a fine of five hundred dollars. (R. 155.) From this judgment, an appeal was taken by the defendant below to the Court of Appeals of the District of Columbia, and argument was had thereon on May 7 and 8, 1928. (R. 181.) Thereafter, on November 20, 1928, the said Court certified five certain questions to this Court, upon which it requested instructions (R. 181-192), following which this Court, on January 3, 1929, directed that the entire record be sent up (R. 194); and the cause is now presented on that record for review and decision by this Court.

The indictment, as returned by the grand jury, was in ten counts, (R. 1-22), and attempted to charge a violation of the provisions of Section 102, R. S. U. S. (U. S. C. A., tit., 2, sec. 192), which provides as follows:

> "Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100, and imprisonment in a common jail for not less than one month nor more than twelve months."

To the indictment, the defendant below interposed a demurrer. (R. 23-29.) After hearing argument, the Court below sustained the demurrer, as to the *third*, *sixth*, *seventh* and *tenth* counts of the indictment, and overruled it as to the *first*, *second*, *fourth*, *fifth*, *eighth* and *ninth* counts of the indictment, (R. 50), on which counts of the indictment the defendant below was put to trial. In the course of the trial, the United States At-

torney entered a nolle prosequi as to the *second* count of the indictment, (R. 14), and at a later stage of the trial made a similar entry as to the *eighth* count of the indictment. (R. 144.) At the conclusion of the evidence, the Court below overruled the motion of the defendant for a directed verdict (R. 138, 157) and submitted the case to the jury upon the remaining counts of the indictment, namely: the *first, fourth, fifth* and *ninth* counts, (R. 169); and the jury, under the charge of the Court, (R. 160-176), returned a verdict of guilty as to the said *first, fourth, fifth* and *ninth* counts of the indictment, (R. 51).

The Indictment.

The indictment starts with a lengthy inducement, setting forth that the Government for many years past has been greatly disturbed by the diminution of the supply of petroleum; the promulgation of withdrawal orders by the Presidents; the making of certain leases of portions of the Naval Reserves; concerning which charges of fraud, collusion and bad faith had been brought to the attention of the Senate; the adoption of Senate Resolution 282, April 29, 1922, which is set forth in the indictment (R. 8), and which directed the Secretary of the Interior to send to the Senate copies of all leases affecting the Naval Oil Reserves, executive orders, papers and correspondence, agreements, etc., in relation thereto, contracts for drilling wells, etc., and further authorized the Committee on Public Lands and Surveys

> "to investigate this entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preserva-

> tion of its natural resources and to report its findings and recommendations to the Senate"; (R. 9)

and on June 5, 1922, the adoption of a certain other resolution, No. 294, also set forth in full in the indictment (R. 9), which authorized said Committee to perform its duties at such times and places as it deemed necessary, and to require the attendance of witnesses and the administering of oaths to them and provided further that any person who refused or failed to obey the process of the Committee or to answer questions pertinent to said investigation should be punished as prescribed by law, and also provided for the expenses of the Committee; the adoption of a further Senate Resolution, No. 434, on February 5, 1923, also set forth in full (R. 10), providing that Senate Resolution 282, agreed to April 1, 1922 (the first above-mentioned), and Senate Resolution 292, agreed to May 15, 1922 (the latter actually having no relation to the subject-matter, and claimed by the Government to have been erroneously described in place of Resolution 294 of June 5, 1922, second above-mentioned),

> "be, and the same are, continued in full force and effect until the end of the Sixty-eighth Congress",

and authorizing the Committee to sit during the sessions or recess of the Senate and after the expiration of the then present (Sixty-seventh) Congress until the assembling of the Sixty-eighth Congress, and until otherwise ordered by the Senate; and the adoption on February 7, 1924, of a certain other resolution, No. 147, also set forth in full (R. 10-11), which is practically an exact duplicate of Senate Resolution 282, except that in the paragraph directing the Committee to investigate with particular reference to the protection of the rights and equities of the Government, it is also directed

> "to ascertain what, if any, other or additional legislation may be advisable", (R. 11)

and, like Resolution 294, agreed to June 5, 1922, it authorizes the Committee to require the attendance of witnesses, administer oaths, etc.

The indictment then proceeds to charge (R. 12) that,

> "by force and under authority of said resolutions",

the Committee was empowered and directed to investigate the subject of the protection of the rights and equities of the Government, and ascertain what, if any, other or additional legislation might be advisable; and that the Committee did in fact thereupon proceed to exercise that authority and make such investigation, and that the said matters then and there, therefore, came under inquiry before the Committee, for which it held sundry hearings, at which witnesses were examined and that said Harry F. Sinclair (appellant) was summoned as a witness by the authority of the Senate to appear before said Committee, and on December 4, 1923, did so appear and was then sworn before said Committee. The indictment further charges that on March 22, 1924, the matters and questions still being under inquiry before said Committee, said Sinclair

> "having been theretofore, to wit, on March 19, 1924, again summoned by said Committee, by authority of the Senate, to give testimony and to produce papers, and having been sworn as aforesaid, again did appear before said Committee as such witness; that thereupon the Hon. Thomas J. Walsh, a member of said Committee, for said Committee, propounded to said Harry F. Sinclair a

certain question which, as said Harry F. Sinclair then well knew, was a question pertinent to said matters and questions then and there under inquiry before said Committee as aforesaid, that is to say, a question in the following words:

"Senator Walsh: Mr. Sinclair, I desire to interrogate you about a matter concerning which the committee had no knowledge or reliable information at any time when you had heretofore appeared before the committee and with respect to which you must then have had knowledge. I refer to the testimony given by Mr. Bonfils concerning a contract that you made with him touching the Teapot Dome. I wish you would tell us about that."

This is followed by an innuendo, in substance, that said Hon. Thomas J. Walsh thereby meant and intended, as said Sinclair then and there well knew and understood, to elicit from the latter facts which were then within his knowledge touching the execution and delivery of a certain contract, and then follows the further charge that said Sinclair then and there unlawfully did refuse to answer said question. (R. 12, 13.)

The fourth count realleges and adopts the allegations in the first count down to the question, which is:

"Senator Walsh of Montana: Since you were on the stand last Mr. John C. Shaffer told us about an agreement between yourself and Secretary Fall, under which Mr. Shaffer was to receive from you a certain portion of the territory covered by the lease which you secured for the Mammoth Oil Co. Will you tell us about that matter?"

This is followed by an innuendo averring, in substance, that Senator Walsh thereby meant and intended, as Sinclair well knew and understood, to elicit from the

latter facts which then were within his knowledge touching a certain other contract, which said question, as said Sinclair then well knew, was a question pertinent to said matters and questions then under inquiry, and that he unlawfully did refuse to answer. (R. 16, 17.)

The fifth count likewise adopts the allegations of the first count down to the question, which is:

> "Senator Walsh of Montana: Mr. Sinclair, will you tell the committee where and when you met Secretary Fall during the months of November and December last?"

with the innuendo that Senator Walsh thereby meant and intended, as Sinclair well knew and understood, to elicit from the latter facts which then were within his knowledge touching conferences theretofore had between said Sinclair and said Fall, who had been a witness before said Committee and had testified to certain facts, the truth whereof the Committee was desirous to establish in the determination of further facts touching the execution and delivery of the lease of April 7, 1922; which question, as Sinclair knew, was a question pertinent to said matters and questions under inquiry, and that he unlawfully refused to answer it. (R. 17, 18.)

The ninth count likewise adopts the allegations of the first count, except that, instead of Senator Walsh propounding the question, Senator Alva B. Adams asked:

> "Senator Adams: Mr. Sinclair, I believe in an earlier hearing you testified, in answer to a question, that you had in no way, and none of your companies had in any way, given or loaned anything to Secretary Fall. Is that correct?"

with the innuendo that Senator Adams meant and intended, as Sinclair knew and understood, to elicit from

him facts then within his knowledge touching the circumstances under which the lease of April 7, 1922, had been made, and the question whether any improper or unlawful means or influence had been used in the procurement of said lease, which question it is alleged was a pertinent one, and that said Sinclair unlawfully refused to answer it. (R. 21.)

Demurrer to Indictment.

The defendant filed a demurrer to the indictment and to each count thereof, alleging in substance that the only judicial powers conferred on Congress by the Constitution were (a) the trial of impeachments, (b) deciding cases of contested elections, (c) determining the qualifications, elections and returns of its members, (d) punishing its members for disorderly behavior or for failure to attend its sessions, (e) expelling a member; that the Senate was a tribunal of limited and specifically defined jurisdiction, and that the indictment failed to aver facts showing any jurisdiction in the Senate to require the defendant to answer any of the questions propounded to him in said indictment, and hence that his refusal to answer could not subject him to a criminal prosecution. (Notes 1, 3, 4, 7 and 8 of Demurrer; R. 23-26.)

A further ground of demurrer was that even if the Senate had authority to compel testimony in aid of its legislative functions, the indictment failed to allege facts showing that the authority from the Senate under which the Committee was acting at the time the questions were propounded, had for its object the procuring of information in aid of legislation, and also failed to allege that the questions which the witness declined to answer were pertinent thereto. (Note 6 of Demurrer, R. 25.)

A further ground of demurrer was that the subject matter of said investigation violated the Fourth and Fifth Amendments to the Federal Constitution, and that

defendant's refusal to answer, therefore, was not an offence against the provisions of Section 102 of the Revised Statutes. (Note 8 of Demurrer, R. 25-26.)

A further ground of demurrer was that the indictment was defective in that the several resolutions recited in the indictment under which it was alleged the Committee of the Senate was acting at the time the defendant refused to answer the questions set forth in the indictment, had been superseded and abrogated by the passage of Senate Joint Resolution No. 54 by the Congress of the United States prior to the time the defendant refused to answer the questions propounded to him, and that by Joint Resolution No. 54 Congress had fully legislated upon the subject matter of the inquiry to which said questions might have been pertinent. (Note 2 of the Demurrer; R. 23.)

A further ground of demurrer was that the indictment was bad in that each and every count was vague and uncertain in that each count failed to show whether it was intended to charge that the questions defendant refused to answer were pertinent to so much of the resolution as directed an investigation "with particular reference to the rights and equities of the Government of the United States and the preservation of its natural resources," or to so much of the resolution of February 7, 1924 (S. R. 147) as directed the Committee "to ascertain what, if any, other or additional legislation may be advisable." (Note 11-a of Demurrer; R. 26.)

A further ground of demurrer to the First Count of the indictment was that it was bad for repugnance because the statement of Senator Walsh set out therein, on its face shows that it was not a question pertinent to any matter contained in the Resolutions which the Committee or the Senate had authority to compel testimony upon, and also that this count showed that the question related to a judicial inquiry and was beyond

the jurisdiction of the Senate. (Note 11-b of Demurrer; R. 26, 27.)

A further ground of demurrer to the Fourth, Fifth and Ninth Counts of the indictment was that they were bad because so far as the questions concerned might be claimed to be relevant to an inquiry to determine the rights and equities of the United States, such inquiry was not cognizable by the Senate and one which had by Joint Resolution of Congress been referred to a proper judicial forum. That said questions had no other apparent relevancy, and that the averment that they were pertinent was merely a conclusion of law with no averment of facts in support thereof. (Note 11-e of Demurrer; R. 27.)

A further ground of demurrer was that the proceedings of the Senate, and the indictment, show that said Committee was not conducting an inquiry in aid of legislation but was, at the time of the alleged refusal, conducting a fishing expedition in search of evidence relating to judicial inquiries theretofore instituted pursuant to Senate Joint Resolution No. 54. (Note 12 of Demurrer; R. 28.)

The Evidence.

The facts themselves are all undisputed, the questions involved having to do with the conclusions to be drawn therefrom. It will therefore be convenient at this point to set forth a brief summary of the entire evidence.

On behalf of the Government there was introduced the executive orders and the resolutions set forth in the indictment; a subpoena (Gov. Ex. 16; R. 83) dated December 21, 1923, issued by the Chairman of the Committee to the Sergeant at Arms, directed to the appellant, summoning him to appear December 24, 1923, bearing a deputization by the Sergeant at Arms of William C.

Hecht, and return of service by said Hecht as "United States Marshal, Southern District of New York," dated December 22, 1923, with a further return by the Sergeant at Arms dated December 27th of service through his said deputy, (R. 84); also a purported subpoena (Gov. Exs. 15 and 15a; R. 82), being a telegram dated March 19, 1924, from David S. Barry, Sergeant at Arms, to William C. Hecht, United States Marshal, requesting him to serve the subpoena quoted in said telegram, and a purported return upon said telegraphic subpoena of service by William C. Hecht, as United States Marshal, Southern District of New York (R. 83); also so much of the minutes of the Committee meeting of March 22, 1924, as contain the questions set forth in the indictment, together with Mr. Sinclair's response:

> "Mr. Sinclair: I decline to answer on advice of counsel on the same ground." (R. 86-87.)

And a portion of a statement by Mr. Sinclair to the Committee of the ground of his refusal (R. 88); also the testimony of Senator Adams that he was a member of the Committee which was sitting and having hearings in the District, and, over objection of the defendant that the question and answer involved a conclusion of law, that the Committee were sitting in obedience to the resolutions on March 22, 1924; and that the Harry F. Sinclair who appeared before the Committee on that date is the same person as the defendant. (R. 88-89.) Also the testimony of Senator Smoot that he was a member of the Committee December 4th, 1923, who the other members were, and that on December 4th, he administered the oath to Mr. Sinclair, who is the same person as the defendant. (R. 88-89.) Also the testimony of Senator Walsh that on March 22, 1924, he was a member of the Committee, and, again over objections of defendant, that

it was sitting pursuant to the resolutions; and that the defendant had appeared that day and refused to answer the questions that were propounded to him before the Committee. (R. 89.)

Also Government Exhibits 17 and 18, being agreements dated September 25, 1922, between Mammoth Oil Company, by H. F. Sinclair, President, and F. G. Bonfils and John Leo Stack, which Senator Walsh identified as having been before said Committee and received in evidence and testified with relation to. (R. 90, 91.)

Also Government Exhibit 19, being an agreement dated March 11, 1922, by and between the Mammoth Oil Company and Societe Belgo-Americaine des Petroles du Wyoming (R. 95), which Senator Walsh also identified as having been submitted to the Committee, and which agreement it was further stipulated had been produced before the Committee by Mr. Sinclair at a hearing held October 29, 1923. (R. 91.)

And on the foregoing evidence the Government rested their case. (R. 91.)

The defendant offered in evidence the minutes of the hearing of October 29, 1923, containing Mr. Sinclair's statement to the Committee on that date, and, on objections of the Government, it was excluded. (R. 92-115.)

The defendant offered further minutes of the proceedings of March 22, 1924, of the Committee showing a colloquy among its members as to the right, propriety or fairness of seeking to examine Mr. Sinclair with respect to the subject matter of the leases under investigation because of the fact that a civil suit had been instituted and criminal prosecution was about to be instituted against Mr. Sinclair with relation to those matters. (R. 115-122.)

The minutes so offered show that during the course of the colloquy among the members of the Committee the following occurred:

"Senator Bursum: Mr. Chairman, I feel that in the case of Mr. Sinclair and his relations to the leases the fact that he is now a defendant before the courts; that the Government is engaged in the prosecution of that suit, and that he is charged with having committed a crime and may be indicted and will likely be subjected to investigation before grand juries of the country, it would not be fair treatment to require him to testify in any matter relating to those transactions; that is, to the leases to which he is a party, or his companies. * * *" (R. 116.)

"Senator Bursum: Mr. Chairman, I would like to have the questions involved here divided. I would like to have a poll specifically on the proposition of requiring Mr. Sinclair to testify in matters relating to the case now pending before the courts. * * *" (R. 118.)

"The Chairman: There is no motion pending. The question is, as I understand, whether Mr. Sinclair shall be called before the committee to give testimony. That is the question on which the first vote should be taken.

"Senator Bursum: I would like to have that question specifically given—testimony relating to matters involved which are not pending in the courts. * * *" (R. 119.)

"Senator Adams: I move that we proceed, Mr. Chairman, with the examination of Mr. Sinclair."

The foregoing portion of the colloquy was excluded. (R. 144-5.)

The defendant then offered the following portion of colloquy, which was received in evidence. (R. 147.)

"Senator Bursum: Mr. Chairman, I move an amendment to that motion that such examination shall not relate to any matter now pending in the Federal court in which case Mr. Sinclair may be a defendant.

"Senator Dill: Mr. Chairman, that is the same thing as saying that he shall not be called, because the committee has no interest in anything except the cases before the court.

"Senator Bursum: Not necessarily. We may have other questions. The Senator from Montana referred yesterday to pending legislation. There may be other matters. I do not mean to say that Mr. Sinclair is disqualified as a witness on matters relating to pending legislation.

"Senator Dill: No; but they touch naval oil reserves and the leasing of reserves, and that certainly touched this case. * * *" (R. 120.)

"Senator Spencer: * * * I suggest, Mr. Chairman, that the witness be called, and the matter come up when the questions are asked.

"The Chairman: Will you state your motion again, Senator Bursum?

"Senator Bursum: My motion was that in the examination the inquiry shall not relate to pending controversies before any of the Federal courts in which Mr. Sinclair is a defendant, and which questions would involve his defense.

"Senator Dill: Mr. Chairman, before that motion is put, if that motion is carried, does that preclude questions regarding the Mammoth Oil Co. and the Sinclair companies and the handling of their stocks and the transactions in connection with them?

"Senator Bursum: Well, it relates to the case.

"Senator Dill: Then, we should vote this question down.

> "Senator Walsh of Montana: Of course we will vote it down. It is the same thing as the general proposition. If we do not examine Mr. Sinclair about those matters, there is not anything else to examine him about. Then I have not anything else that I want to examine him about." (R. 121.)

The amendment of Senator Bursum was voted down. (R. 122.)

The defendant also introduced in evidence the statement he made before the Senate Committee (omitting the first paragraph of the statement, which had been introduced by the Government, R. 88), wherein he set forth his reasons for declining to answer. (R. 123-128.)

In this statement the defendant set forth in substance that he had been before the Senate Committee at five previous sessions and had produced all books and papers and answered all questions asked by it, and had been finally excused from further attendance (R. 123); that subsequent to his last appearance Senate Joint Resolution 54 had been passed by both Houses and had become a law, which resolution recited that it appeared from evidence taken before the Committee that certain leases made by the Government to the Mammoth Oil Company and the Pan-American Petroleum & Transport Company and other agreements between them were executed under circumstances indicating fraud and corruption, and that whereas the said leases and contracts were entered into without authority on the part of the Government officials and contrary to the settled policy of the Government, it was resolved that they were against the public interest and the lands should be recovered, and, further, that the President "is authorized and directed immediately to cause suit to be instituted" for the cancellation of the leases, etc., and to prosecute such other actions, civil or criminal, as might be warranted, and further directing and authorizing the President to ap-

point special counsel to prosecute such litigation. (R. 124-5.) Mr. Sinclair stated that the resolution in effect denounced the lease with the company of which he is president, as void because of fraud and corruption and for want of authority; that it amounted to an assertion that under the "rights and equities" of the United States the land belonged to the United States; further, that it definitely outlined the policy of the Government with respect to the preservation of the natural resources, and that it directed the institution of proceedings in relation to the matter and the employment of special counsel to prosecute the same; that thereafter the President had appointed such counsel, who had filed a bill of complaint in the District Court of the United States for the District of Wyoming, which in its Paragraph 28 charged him with fraudulently combining, etc., with Mr. Fall, (R. 125-6); and that thereafter the said special counsel had officially announced that they had applied for the organization of a special jury in the District of Columbia for the purpose of inquiring into any offenses or crimes growing out of the execution of the lease, (R. 126-7); that from these circumstances it was clear that the Committee, if it had any power to proceed under the resolution and the Constitution, was not now engaged, nor could it be engaged, in any investigation "with particular reference to the rights and equities of the United States and the preservation of its natural resources," because the Senate had already passed upon the questions embraced within that authorization; further, that it was now clear that Congress had made of the whole matter a judicial question, determinable solely by the courts, and that it was then actually pending therein, and that consequently the Committee was without any jurisdiction to question him further

"regarding the procurement of the lease or the validity thereof, or any fact or circumstance pertaining thereto;"

that such an examination would be clearly outside the jurisdiction of the Committee, and in effect an examination before trial by an unauthorized body and in a wholly unauthorized manner; further, that if the examination should be directed towards eliciting facts concerning fraud or corruption, the Committee in effect would have constituted itself a grand jury as to the matter already directed by Joint Resolution 54 to be presented to the proper authorities, (R. 127); that any pertinent question which the Committee could ask would necessarily relate to the procurement of the lease and its validity, and that those matters had been referred to the courts of proper jurisdiction; and further, that following his declination to answer the questions propounded by Senators Walsh and Adams he was by the Committee excused. (R. 128.)

Appellant also offered in evidence Paragraphs 1, 18, 26 and 28 of the bill of complaint referred to in his statement before the Committee. (R. 128, 129.) He also proved that Albert B. Fall had resigned as Secretary of the Interior March 4, 1923; further, that the 68th Congress assembled Monday, December 3, 1923. (R. 130.) He also requested the Court to take judicial notice of Senate Joint Resolution 54, approved by the President February 8, 1924. (R. 130, 131.)

Appellant also offered the testimony of his counsel, Mr. Littleton. (R. 131-134), which, on objection of the Government, was excluded, (R. 156). The testimony of Mr. Littleton so offered and excluded, in substance, was that he had been actively engaged in the practice of law since 1891, had served in Congress, and while a member, was a member of the Judiciary Committee of the House, and then and at other times had had occasion to examine

into the powers of the Houses of Congress respecting the conduct of investigations, and had given the matter special and careful consideration, (R. 131-32); that he had been retained by Mr. Sinclair about the middle of December, 1922, and that he had appeared with him as counsel during his various appearances before the Senate Committee on Public Lands and Surveys, to which had been referred Senate Resolutions 282, 294, 434 and 147 set out in the indictment; that he had examined and considered the said resolutions, also the decisions of the courts respecting the powers and limitations of the Houses in the conduct of investigations, (R. 132); and that he was present with Mr. Sinclair at the hearing March 22, 1924; that he had appeared there the day previously and asked to be heard; that the statement made to the Committee by Mr. Sinclair on March 22, 1924, had been prepared in accordance with and was based upon the advice given Mr. Sinclair by him, after an examination of the proceedings theretofore had before the Committee; that he was present during the time the questions were propounded, sitting beside Mr. Sinclair prepared to advise him, as previously arranged, as to the propriety of any questions propounded, according to the best of his ability to judge under the circumstances whether they related solely to the litigation already afoot, that is, the judicial matters referred to the courts by Senate Joint Resolution 54, or whether they were ones which might be related to legislation, a power conferred upon the Committee for the first time by the resolution of February 7, 1924. And if the questions which were asked could be seen to relate to legislation he would be advised to answer, but if they related solely and apparently solely to the litigation which had been referred to the courts he would be advised not to answer. That as each of the questions contained in the indictment was propounded he advised Mr. Sinclair

not to answer, because it was his judgment that they related to nothing else but the litigation, and having heard the colloquy between the Senators in which they had said they did not wish to ask about anything else, as well as judging the questions on their intrinsic qualities, the advice was given on that ground, and also in the light of the resolution which he had before him for that purpose. (R. 134.)

The foregoing covers all the evidence introduced by the parties as well as that offered by the defendant and excluded by the trial Court.

Rulings of the Trial Court and Charge to the Jury.

The Trial Court held that the question of pertinency of the questions asked was one of law for the Court and not one of fact for the jury. (R. 115.)

The Court also held that the question as to the validity of the summons served upon the defendant to appear before the Senate Committee, and the questions as to regularity and the authority for the administering of an oath to the defendant when he appeared before the Committee were solely questions of law to be determined by the Court. (R. 170.)

The Court charged the jury that in determining the guilt or innocence of the defendant, their function consisted only of answering four questions. The charge of the Court being as follows:

> "When I say that you have got to decide these four questions—whether Sinclair was summoned as a matter of fact, whether he appeared as a matter of fact, in Washington; whether he was sworn as a matter of fact, whether he was asked these questions and refused to answer them you are concerned only with the matters of fact that are

involved in those questions. Did he in New York get the command of the Senate committee to appear here as a matter of fact? Did he appear here? When he appeared did one of the Senators —I have forgotten which one—or some officers of that committee, administer to him an oath? And did he then and there proceed to give certain testimony, and later when he was recalled again refuse to give certain testimony?

"Whether the officer who served him in New York had legal authority to serve him, whether the official who swore him, if you find from the evidence that he was served by an officer and that he was sworn by an official, whether the officer in New York or the Senator in Washington had legal authority to serve him and to administer the oath to him, are not questions which you are called upon to decide. They are troubles which must be decided elsewhere." (R. 170.)

The Court further charged the jury that if they answered the said four questions affirmatively,

"then it is your duty under the law to find him guilty under said counts." (R. 169.)

As has been already stated, the jury under the charge of the Court, returned a verdict of guilty as to the *first*, *fourth*, *fifth* and *sixth* counts of the indictment, (R. 51); and the defendant was sentenced, by the Court, to imprisonment for a period of three months and to pay a fine of five hundred dollars. (R. 155.)

POINTS TO BE DISCUSSED ON THIS BRIEF.

Point I.

The trial Court erred in overruling the demurrer as to the *first*, *fourth*, *fifth* and *ninth* counts of the indictment.

Point II.

The Court erred in overruling the motion of the defendant below to direct the jury to return a verdict of not guilty, because the questions propounded to the defendant below called for testimony relating solely to his private business and the Committee had no jurisdiction to make such an inquiry, and the witness rightfully refused to answer the questions.

Point III.

The Court erred in overruling the motion of the defendant below to direct the jury to return a verdict of not guilty, because the questions propounded to the defendant called for testimony relating solely to matters cognizable alone by the courts, which were at the time pending in the courts, and the Committee had no jurisdiction to inquire into such matters, wherein relief or redress could be had only in a judicial proceeding, and the witness rightfully refused to answer such questions.

Point IV.

The Court erred in overruling the motion of the defendant below to direct the jury to return a verdict of not guilty, because, even though the Committee were authorized to make an investigation in aid of legislation,

the questions propounded to defendant below inherently disclose, and the colloquy in the Committee conclusively establishes, that it had avowedly departed from any inquiry in aid of legislation and was seeking information upon matters which had been referred to the Courts, where alone relief or redress could be had and where the witness was a defendant; and therefore the committee had no jurisdiction of the matters covered by the questions and the witness rightfully refused to answer.

Point V.

The Court erred in overruling the motion of the defendant below to direct the jury to return a verdict of not guilty, because there was no proof of an authorized inquiry, a legal summons, or duly administered oath.

Point VI.

The Court erred in overruling the motion of the defendant below to direct the jury to return a verdict of not guilty, because there was no proof that the questions propounded were questions of the Committee.

Point VII.

The Court erred in overruling the motion of the defendant below to direct the jury to return a verdict of not guilty, because there was no proof that the questions propounded to the witness were pertinent to any inquiry which the committee was authorized to conduct.

Point VIII.

The Court erred in holding that the question of pertinency of the questions was one of law for the Court,

and not a mixed question of law and fact or a question of fact to be decided by the jury, and thereby refused to submit to the jury all of the essential ingredients of the crime charged, which refusal amounted to a denial of the right to trial by jury.

Point IX.

The Court erred in excluding evidence offered to prove that the witness rightfully refused to answer the questions.

ARGUMENT.

Point I.

The Trial Court Erred in Overruling the Demurrer as to the First, Fourth, Fifth and Ninth Counts of the Indictment.

The indictment is bad for failure to state a crime, and for lack of certainty.

The statute under which the prosecution was brought has been construed by the Supreme Court of the United States in three cases, namely,

Kilbourn v. *Thompson*, 103 U. S. 168;
In re Chapman, 166 U. S. 661;
McGrain v. *Daugherty*, 273 U. S. 135;

so far as the power to compel testimony is concerned.

Such a power is of course in derogation of the Fourth Amendment. Its possession by the courts is justified upon the grounds of necessity.

"• • • in other words, the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law." (211 U. S. 419-20.)

Harriman v. *Interstate Commerce Commission*, 211 U. S. 407, 417-421;
Marshall v. *Gordon*, 243 U. S. 521, 540, 541;
Boyd v. *United States*, 116 U. S. 616, 631;
Re Pacific Railway Commission, 32 Fed. 241;
Robinson v. *Philadelphia & R. R. Co.*, 28 Fed. 340, 342;
Matter of Barnes, 204 N. Y. 108, 117-120, 126, 127;
4 Wigmore on Evidence, (2nd ed.), pp. 648-650, sec. 2192.

Under the Constitution the Senate has certain judicial or quasi-judicial functions, such as the trial of impeachments, the decision of cases of contested elections to the Senate, the qualifications of its members,—their punishment for disorderly conduct or failure to attend sessions, and their expulsion. In this judicial capacity it of course has the same power as the courts to compel testimony. That power, however, was questioned in the *Chapman Case*, *supra*, and particularly the constitutionality of this statute. (Sec. 102 R. S.) It will be observed that the statute makes it an offense to refuse

"to answer *any* question pertinent to the question under inquiry."

In the *Chapman Case*, *supra*, it was contended that the use of the word "any" extended the statute quite beyond the power of the Senate to compel testimony, and thus

violated the Fourth Amendment. It was recognized by this Court that there was no *general* power of investigation, embracing the right to compel testimony, enjoyed by the Senate, and, following its usual rule, that

> "nothing is better settled than that statutes should receive a sensible construction, such as will *effectuate the legislative intention*, and if possible so as to avoid an unjust or absurd conclusion,"

this Court held that the word "any", as used in the statute,

> "refers to matters *within the jurisdiction* of the two houses of Congress before them for consideration and proper for their action; to questions pertinent thereto and to facts or papers bearing thereon." (166 U. S. 667.)

The Senatorial inquiry in the *Chapman Case* related to charges of corruption on the part of Senators, so the investigation was obviously within the judicial functions of the Senate. The questions, answers to which were refused, were obviously on their face pertinent. Chapman was a member of a brokerage firm, and the questions he refused to answer were as to whether any Senators had been speculating in sugar stocks, the value of which was directly affected by certain tariff legislation then pending in the Senate. This case, therefore, simply establishes that, notwithstanding the Fourth Amendment, the Senate when proceeding in its judicial capacity has the same power as the courts to require testimony, and that the statute makes it an offense for a witness to refuse to answer pertinent questions in such an inquiry or an inquiry "within the jurisdiction of the two houses of Congress." The Senate of course had the inherent power

without this statute, but the statute had the effect of making the refusal a punishable offense.

In the case of *Kilbourn* v. *Thompson, supra*, there was involved an inquiry by the House in the nature of a general investigation into a judicial matter wholly without the cognizance of the House. The situation was in many respects parallel to that here involved. There were rumors and charges concerning an alleged real estate pool in Washington, in which the banking firm known as Jay Cooke & Co. were understood to be interested. The United States was a creditor of that firm, due to alleged improvident deposits made by the Secretary of the Navy of public moneys with it, and the firm was in bankruptcy. It was charged that an inadequate investigation had been made concerning the firm's interest in the alleged pool, with the result that the creditors, including the United States, would be subjected to disadvantage and loss by reason of the failure properly to assert the interests of the firm in the pool. The disposition of the affairs of Cooke & Co. was pending in the bankruptcy courts of the United States at Philadelphia. These charges and facts were brought to the attention of the House, whereupon it appointed a committee

> "to inquire into the matter and history of said real-estate pool and the character of said settlement, with the amount of property involved in which Jay Cooke & Co. were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers and report to this House." (103 U. S. 171.)

In this respect the situation was practically identical with that involved in the present case. Here charges had been made that portions of the Naval Reserves had been leased to the Mammoth Oil Company, of which Mr. Sinclair was president, and others, by Secretaries Fall and

Denby, without adequate authority in law, and that the negotiation of said leases was attended by corruption. In that state of affairs, Senate Resolution 282 of April 29, 1922, was adopted. (R. 8.) It directed the Secretary of the Interior to send the leases and all correspondence, contracts, etc., relating to the matter to the Senate, and resolved that the Committee on Lands and Public Surveys

> "be authorized to investigate this entire subject of leases upon Naval Oil Reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the Senate." (R. 9.)

This resolution was supplemented June 5, 1922, by a further resolution (S. R. 294) which authorized the Committee to summon witnesses. (R. 9.)

On February 5, 1923, the Senate adopted S. R. 434, by which S. R. 282 was continued in force and the Committee authorized to hold sessions during the recess between the 67th and 68th Congresses. (R. 10.) On February 7, 1924, following the assembling of the 68th Congress, a new resolution was adopted (S. R. 147), which embodied all the provisions of the previous resolutions, with the important addition of a direction to the Committee

> "to ascertain what, if any, other or additional legislation may be advisable." (R. 11.)

On February 8, 1924, the President signed Senate Joint Resolution 54, theretofore passed by both Houses, (R. 124-5), which in substance recited that the leases

were invalid for want of authority, contrary to the settled policy of the country regarding preservation of the national resources, and their negotiation attended by corruption, and authorizing and "directing" the President to institute civil proceedings for the recovery of the land and such criminal proceedings as might be warranted, and to employ special counsel to that end.

This, therefore, brought the situation in closer parallel with the *Kilbourn Case*. That is, there were charges in each case concerning improper protection of the rights and interests of the United States, and, although the subject-matter of such charges was in litigation in the courts having jurisdiction to ascertain and determine the "rights and equities of the Government", the respective Committees were authorized to investigate those matters. But in the instant case there was after February 7, 1924, this important distinct addition, that is, authority to the Committee to inquire further, for the purpose of ascertaining what, if any, additional legislation might be advisable.

In the *Kilbourn Case, supra*, Kilbourn had been called as a witness and was asked several questions clearly enough pertinent to the subject-matter of investigation, but which he declined to answer. In that case, this Court, after a most careful examination of the law, reached the definite conclusion that there was no unlimited power of investigation by compulsory testimony in either House, but power to compel testimony only with respect to matters within the jurisdiction of the Houses. From that point, on examination of the proceedings in the House, this Court reached the conclusion that the investigation attempted to be conducted by the House was in its nature clearly an investigation "judicial in its character" and one which "could only properly and successfully be made by a court of justice" in a judicial proceeding by an entirely different branch of the Government. (103 U. S. 192, 193.)

It is quite apparent from its discussion of the matter that the Court reached this conclusion not from the terms of the resolution itself, but from the nature of its subject-matter.

As will be shown presently, the presence or absence of a clause similar to that embraced in the resolution of February 7, 1924 (S. R. 147), relating to possible legislation as an objective, is not controlling, but instead the subject-matter and nature of the investigation itself.

Upon the conclusion that the nature of the inquiry being attempted by the House was judicial, this Court held that the House was proceeding quite without its sphere, beyond its authority, and that the refusal to answer was justified. Whether or not the Houses of Congress possessed any power to compel testimony in aid of legislation, the Court expressly declined to decide, that of course being unnecessary, because of its conclusion concerning the nature of the inquiry. (103 U. S. 189.)

Thus it will be seen that under the resolutions previous to the resolution of February 7, 1924, by their very tenor, they undertake an investigation falling squarely within the class involved in the *Kilbourn Case, supra,* namely, a judicial inquiry and an attempt at a determination "of the rights and equities of the United States." Indeed, as shown by Joint Resolution 54, Congress did "adjudicate" the validity of the leases and the charges of corruption, and, realizing that its own adjudication was of no validity, then "directed" the President to take the matters to the proper forums for enforceable adjudication.

Consequently, it is manifest that any proceedings under the resolutions preceding S. R. 147 would be absolutely in excess of the power of the Senate, as held in the *Kilbourn Case,* and, so far as any further investigation even under S. R. 147 should be pursued to the same

end, that is, the determination "of the rights and equities of the United States" as distinguished from ascertaining what additional legislation might be advisable, the Committee would likewise be in excess of its constitutional power, notwithstanding, as was later decided by this Court in *McGrain* v. *Daugherty*, 273 U. S. 135, that it had power to compel testimony when necessary for the effective discharge of its legislative function.

McGrain v. *Daugherty, supra*, settled the question left undecided in the *Kilbourn Case, supra;* that is, that the Houses of Congress have power to compel testimony in aid of their legislative functions.

The situation involved in the *Daugherty Case*, however, was vastly different in its legal aspects, although somewhat similar in its facts, to the *Kilbourn Case*. In *the Daugherty Case* charges had been made against the then Attorney General of the United States of maladministration and non-feasance in office, and an investigation of these charges had been undertaken by the Senate. M. S. Daugherty, a brother of the Attorney General, had been twice summoned to appear before the Committee as a witness, and had ignored these summonses. An attachment was thereupon issued for him, and he sued out a writ of habeas corpus, upon a petition alleging and setting forth, in substance, that the proposed investigation was in its nature a personal attack upon the Attorney General; that the investigation was wholly without the authority of the Senate, so far as compelling testimony was concerned, and that his refusal to appear was justified on that account. The District Court sustained his contention in that respect, reaching the conclusion concerning the nature of the inquiry, as to whether it was in aid of legislation that it was not, as indicated by the tenor of the resolution, as evidenced by its "extreme personal caste", "spirit of hostility", etc. This Court reversed the District Court,

holding (for the first time) that the Houses of Congress have power to compel testimony in aid of legislation; and, upon examining the subject-matter of the resolution, although observing that it would have been better to have declared a legislative intention, found that the resolution

> "does show that the subject-matter to be investigated was the administration of the Department of Justice * * * plainly * * * one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit." (273 U. S. 177.)

And therefore reached the conclusion that

> "the subject-matter was such that the presumption should be indulged that this was the real object",

and that an express avowal would have been better, although not indispensable. Proceeding, the Court said (p. 178):

> "In the Chapman case, where the resolution contained no avowal, this Court pointed out that it plainly related to a subject-matter of which the Senate had jurisdiction, and said: 'We cannot assume on this record that the action of the Senate was without a legitimate objective'."

From these circumstances, it clearly appears that the situation in the *Daugherty Case* was that the Senate Committee was at least dealing with a subject upon which Congress might very properly legislate, and to aid which

an investigation of the character ordered might be very useful, whatever may have been the actual design or objective of the investigation. And Daugherty, on habeas corpus, having refused to attend, without any proof that the investigation was actually intended to be conducted with designs other than in aid of legislation—with no questions asked, the pertinency of which to either design might be apparent—simply asked the courts to *presume* merely from the hostile tenor of the resolution and the absence of a declaration of legislative purpose that the Senate Committee was not going to investigate in aid of legislation but rather with other designs. Of course the Court refused to indulge any such presumption, quoting from the *Chapman Case:*

> "We cannot *assume on this record* that the action of the Senate was without a legitimate objective."

But the Court recognized clearly that the Senate might

> "be disposed to exert the power beyond its proper bounds or without due regard to the rights of witnesses."

And with respect to such situation, said (*pp.* 175, 176):

> "But if, contrary to this assumption, controlling limitations or restrictions *are* disregarded, the decisions in Kilbourn *v.* Thompson and Marshall *v.* Gordon point to admissible measures of relief. *And it is a necessary deduction from the decisions in Kilbourn* v. *Thompson and Re Chapman that a witness rightfully may refuse to answer where the bounds of the power are exceeded*

or the questions are not pertinent to the matter under inquiry." (Italics ours.)

In other words, had Daugherty appeared before the Senate Committee, and had it attempted to pursue an inquiry of the nature he claimed to apprehend it intended to (and asked the Court to presume it would), then he might have rightfully refused to answer, and he would have been protected under the Fourth Amendment by the courts.

A while back it was said that the presence or absence in a resolution of a declaration of legislative intent is not controlling. It has been seen that in all three of the cases just reviewed there was no avowal of the design of the investigations ordered by the resolutions. But, by the subject-matter of the investigation, in each instance the Court was able to discern that in two of the instances *(Chapman and Daugherty, supra)* the investigations ordered were of a nature within the constitutional power of the Houses, while in the other *(Kilbourn, supra)* it was clearly beyond such power, indeed one expressly and exclusively within the province of another branch of the Government.

On the other hand, in *People* v. *Webb*, 5 N. Y. Supp. 585, another similar investigation had been undertaken by the Legislature of the State of New York involving alleged dishonesty in connection with a contract for repairs of the State capitol, and the resolution (which was very like the original S. R. 282 here) concerning a supposed demand "by public sentiment and the press for an investigation," directed such an investigation to be made, and contained a further avowal of "purposes of remedial legislation." Notwithstanding this avowal of legislative intent, the Court, upon examination of the subject-matter sought to be investigated, reached the conclusion—as did this Court in the *Kilbourn Case*—that

the subject-matter of the proposed investigation clearly concerned "judicial questions," and that it was beyond the power of the Legislature to compel testimony.

It is of course obvious from what has been said by this Court in the *Kilbourn* and *Daugherty Cases*, and from the statute itself, that even were the Senate proceeding upon an investigation within its constitutional sphere, not all questions which might be asked, but only such as are "pertinent," are required to be answered; and "pertinent," as here used, has a considerably wider application than its technical application in the trial of causes in courts of law. There issues are framed, and the Judge can readily determine with exactitude whether a question is pertinent. Here there are no issues; the only guide-post is the subject-matter of the inquiry.

In this situation, it is to be recalled, as previously pointed out, that the limits of the power are the necessity of the evidence to the effectual performance of the constitutional function. This limit of course inheres in the power of the courts as well to trench on the citizen's right of privacy only to the extent necessary to the administration of justice. Obviously no court would compel a witness to answer a question concerning his private affairs over his objection on that ground, however relevant the matter might be, if such matter was already admitted by the answer. For, clearly, there would be no necessity for it, notwithstanding the pertinency. This precise point was ruled specifically with relation to a legislative inquiry in *Matter of Barnes*, 204 N. Y. 108. In that case there was involved an inquiry into alleged corruption and maladministration in connection with the public officers of the City and County of Albany in connection with public printing, and the resolution undertaking it contained a legislative avowal. The witness was called upon to answer questions concerning his interest in a printing company which had had

public contracts; as to when he got his stock, whether he paid anything for it, whether he had talked with a certain party about the consideration for the stock, and whether it was a gift to him,—all these questions he refused to answer. The Court of Appeals held that such evidence was not pertinent within the meaning of the statute, because the Committee already had sufficient evidence for legislative purposes and further interrogation simply involved unnecessary investigation of private business.

And because of the very vagueness which necessarily inheres in the situation, since questions of pertinency are not susceptible of determination by the usual standards in the absence of issues; because of the fact that the power, where it exists, is exercisable by either of the Houses, or even their Committees alone, without the usual provision for resort to the courts for judicial determination of the necessity of the evidence, such as is frequently provided by State legislation affecting the same subject; and because the power is in its nature a direct invasion of one of the most sacred liberties of a freeman,—it behooves the courts, when the exercise of the power is called in question, zealously to safeguard the rights of the citizen, to be *sure* that the power attempted to be exercised is rightfully so, and not to allow any sentiments of delicacy at interfering with another branch of the Government to intrude in the determination of that question.

As said by Mr. Justice MILLER in the *Kilbourn Case*, the exercise of such power

> "should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it that it should receive the most careful scrutiny." (103 U. S. 192.)

This extended review of the principles and decisions applicable to the statute here involved has been undertaken at this point because it is necessary throughout the succeeding discussion to keep in mind the nature and limits of the authority to which the statute in question extends, and it will avoid overlapping consideration of the subject in the subsequent Points.

With these principles in mind, we come next to a dissection of the statute to determine the essental ingredients of the crime.

As has been seen, the first essential ingredient of the offense is the pendency before the Committee of an investigation within the constitutional power, and authority in such Committee to administer oaths and require testimony. The remaining ingredients are apparent from the statute itself: (2) that the accused has been "summoned as a witness"; (3) "by the authority of either House"

> to give testimony upon the matter of the character first above described under inquiry before the Committee,

and (4) "refuses to answer any questions pertinent to the question under inquiry."

Elementary requisites of a valid indictment are that it shall allege all the essential ingredients of the crime, that it shall be sufficiently definite and certain to apprise the accused of the charge against him, and protect him against another prosecution for the same offense.

> *1 Wharton's Criminal Procedure* (10th ed.), Secs. 193, 194, 212;
>
> *United States* v. *Cruikshank*, 92 U. S. 542, 557, 558;
>
> *United States* v. *Carll*, 105 U. S. 611, 613.

It is likewise elementary that where jurisdiction of a tribunal of limited, as opposed to general, jurisdiction is in issue, it must be pleaded. It may not be assumed.

Kempe v. *Kennedy*, 5 Cranch. 173;
Ex Parte Watkins, 3 Peters, 193, 204;
Brown v. *Keene*, 8 Peters, 112, 115;
Grignon v. *Astor*, 2 Howard, 319, 340;
15 Corpus Juris, 718, Sec. 2;
2 Wharton's Criminal Procedure (10th ed.), Sec. 1063, pp. 1506-1510.

For example, in an indictment for perjury alleged to have been committed before a tribunal of limited jurisdiction it will not be sufficient merely to allege the commission of perjury before such tribunal; it is necessary to go further and show by proper averments of fact the nature of the proceeding before the tribunal, in order that the Court may determine as matter of law whether it was a proceeding within the jurisdiction of the tribunal.

Since the Senate, as has been seen, has power to require testimony only in investigations in its quasi-judicial capacity and in aid of legislation, and does not have any power to compel testimony generally in any other kind of an investigation, it necessarily follows that the indictment must show facts from which the Court can determine as matter of law that the inquiry where the witness refused to testify was one within the authority of the Senate Committee before which he appeared. The Committee itself, as distinguished from the Senate, of course, has no power to summon witnesses except by authority of the Senate. The statute here under consideration (R. S. 102, U. S. C. A., Sec. 192) itself relates only to persons summoned "by the authority of either house." Consequently, the authority of the Committee

is to be sought in the resolutions. Thus, the indictment sets forth the several resolutions—282 and 294 (of 1922), 434 (of 1923) and 147 (of 1924). (R. 8-12.)

Following the recital of the resolution (S. R. 147) of February 7, 1924, the indictment proceeds (R. 12),

> "whereupon, and by force and under authority of said resolutions,"

the Committee was empowered and directed to investigate

> "with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to ascertain what, if any, other or additional legislation might be advisable, and to report", etc.;

that said Committee did in fact thereupon proceed to exercise that authority,

> "and the matters so referred to said Committee then and there, to wit, at Washington, in said District of Columbia, therefore came under inquiry before said Committee, and said Committee for that purpose did hold sundry hearings at which witnesses were examined and documents were produced; and that said Harry F. Sinclair was summoned as a witness by the authority of the Senate to appear before said Committee at said hearings, to give testimony and produce papers, and, on December 4, 1923, did in fact appear before said Committee, at one of said hearings, to wit, at Washington, * * * and then and there was sworn as a witness before said Committee concerning

said matters and questions so under inquiry before said Committee."

The indictment then proceeds further:

"* * * that afterwards, to wit, on March 22, 1924, at Washington * * * said matters and questions then and there still being matters under inquiry before said Committee, said Harry F. Sinclair, having been theretofore, to wit, on March 19, 1924, again summoned by said Committee, by authority of the Senate, to give testimony and to produce papers, and *having been sworn as aforesaid*, again did appear before said Committee as such witness, * * *." (Italics ours.)

It will be observed that it is first alleged that the inquiry was being conducted under and by authority of said resolutions, that is, the resolutions previously described—282 of April 21, 1922, 294 of June 5, 1922, 434 of February 5, 1923, and 147 of February 7, 1924. Therefore the question arises, how could Mr. Sinclair be sworn on December 4, 1923, and the Committee be proceeding on that date under and pursuant to the authority of a resolution not passed until more than two months later? It is no mere confusion of dates; for, as will be seen by the following averments, that the accused having been again summoned March 19, 1924 (after the adoption of S. R. 147 of February 7, 1924), "and having been sworn as aforesaid," that is, December 4, 1923, before the adoption of the resolution; it is no fault of the pleader's; the fault is with the facts themselves. The purpose is manifest; that is, to attempt to reach back and seize upon an oath administered when the Committee was proceeding under resolutions containing no avowal of a legislative purpose, manifestly on their face judicial

in character, *and when the Committee was without authority of the Senate to administer an oath.* This latter because of bungling—as the Government claims—on the part of the Senate in failing to extend, carry forward or revive beyond the end of the 67th Congress S. R. 294 of June 5, 1922, which was the *only authorization* to the committee *to administer oaths to witnesses* and compel testimony previous to the adoption of Senate Resolution 147 of February 7, 1924. It is said by the Government that S. R. 434 of February 5, 1923, which purported to extend S. R. 282 of April 21, 1922 (which contains no authorization to take testimony), and S. R. 292 of May 15, 1922, which has nothing whatever to do with the subject-matter here involved, named the latter in error instead of S. R. 294 of June 5, 1922, the one which did give the Committee power to administer oaths to witnesses. (This point will be argued more fully in a later portion of this brief.)

So, we have it on its face that the indictment alleges that the Committee was on March 22, 1924, proceeding under a resolution of February 7, 1924, *and other resolutions*, and that pursuant to the authority of all the resolutions an oath was administered to the witness December 4, 1923, at a time when there was no resolution in force authorizing the administration of an oath.

It is therefore apparent that the indictment does not purport to charge that an oath was administered pursuant to any authority of the Senate.

Again, since from what has been said previously, it would appear to be obvious that the inquiries upon which the Senate Committee was engaged prior to S. R. 147 of February 7, 1924, were in their nature judicial in character, just as in the *Kilbourn Case, supra*, they would be quite beyond the power of the Senate. Consequently, it does not meet the requirements of a valid indictment to couple together S. R. 282 of April 21, 1922; S. R. 294 of

June 5, 1922, and S. R. 434 of February 5, 1923, with S. R. 147 of February 7, 1924, which latter resolution for the first time avowed—along with the continuance of the judicial inquiry—a purpose in aid of legislation, as the source of the authority to require the giving of testimony. An inquiry pursuant to all the resolutions other than S. R. 147 would be clearly beyond the power of the Senate itself, to say nothing of the Committee, and the Committee itself was without authority to summon witnesses either December 4, 1923, or March 19, 1924 (when the accused was "again summoned"), under the earlier resolutions, although on the latter date it had such authorization pursuant to S. R. 147 of February 7, 1924. So it could have been possible after February 7, 1924, for the Committee to engage in an investigation within the powers of the Senate pursuant to S. R. 147—although possible under the same resolution to be engaged in one beyond its powers.

With all the resolutions coupled together as the source of authority, as the indictment does, how can an accused determine upon what authority the Committee is claimed to have proceeded? It is not even certainty of the lowest order. How can this Court determine by the indictment whether the Committee was proceeding with or without power? How could this Court tell but that the verdict against the accused was supported by evidence showing that the Committee was proceeding pursuant to the investigations ordered by S. R. 282 only, as extended by S. R. 434?

The fault is deeper than lack of certainty. It cannot be contended that since S. R. 147 was the only one within the power of the Committee to compel testimony upon, the plural allegation will be disregarded and the earlier resolutions treated as surplusage. The moment that conclusion is reached, it is apparent then that the witness

was never sworn under or pursuant to that inquiry, and not even alleged to have been.

The next fault with the indictment is quite as grave. As has been seen previously, one of the essential ingredients of the offense is that the questions propounded shall be pertinent. The pleader of course recognized this, and by means of conclusion alleged that they were pertinent. He apparently recognized that such an allegation was a mere legal conclusion and, consequently, insufficient. None of the questions involved on their face has any reasonable pertinency to any legislation on any subject which may even be conjectured, and consequently the pleader resorted to innuendoes in an endeavor to supply the inadequacy of his previous averment of pertinency and the apparent absence of that quality on the face of the questions themselves. But here again the difficulty concerning the actual facts was more than the pleader was able to surmount. It will be seen from an examination of each of the questions in the four remaining counts of the indictment that on their face there is no apparent pertinency to any conceivable legislation; and it will be further seen that the innuendoes completely fail to show any meaning to the questions which would render them pertinent to any possible legislation on the subject. It will not escape notice, however, in such examination that, given certain reasonable probable meanings, the questions would be quite pertinent to the judicial inquiry phase of the investigation. The first question is (R. 13):

> "Senator Walsh: Mr. Sinclair, I desire to interrogate you about a matter concerning which the committee had no knowledge or reliable information at any time when you had heretofore appeared before the Committee and with respect to which you must then have had knowledge. I refer to the testimony given by Mr. Bonfils concerning a

> contract that you made with him touching the Teapot Dome. I wish you would tell us about that."

And the innuendo is that the Senator thereby meant to elicit from Mr. Sinclair

> "facts, which then were within his knowledge, touching the execution and delivery of a certain contract * * * between said Mammoth Oil Company, one F. G. Bonfils and one John Leo Stack,"

executed by Mr. Sinclair as President of the Mammoth Oil Company, relating to rights in lands embraced in the Executive Order of April 30, 1915, and the lease of April 7, 1922, previously recited in the indictment. (R. 13.)

Now, taking the "question" by itself, it really is not a question at all. In fact it is to be observed that the stenographer suffixed it not with a question mark but with a period; whereas it will be observed that in the following counts he used question marks. It obviously and plainly is a statement of a wish, not a question at all: "I wish you would tell us about that." But disregarding this infirmity and treating it as a question, the query immediately arises, to what does it relate, the contract or the testimony of Mr. Bonfils. Of course, if the "question" relates to the testimony of Mr. Bonfils, it obviously is not pertinent in the proper sense of that term. But the innuendo says that it was intended to elicit facts known to Mr. Sinclair about the execution and delivery of the contract. (Where the pleader got this idea, is a mystery; it never appeared anywhere on the trial, and, so far as anything of record is concerned, is an assumption existing only in the imagination of the pleader and the averments of the indictment. This, of course, will be dealt with in subsequent Points.) Still the innuendo does not add enough to show that the question

was to elicit information helpful to the Committee in recommending legislation. What "facts" about the execution and delivery of the contract did Senator Walsh—not necessarily the Committee—want? What kind of a pen Mr. Sinclair signed it with? Perhaps it was a quill pen! That might be a matter of interest to some Senator, but how could it aid the Committee in recommending legislation? The description (if such it may be termed) of the facts fails quite to add anything to the previous averments of a legal conclusion of pertinency:

In the fourth count the question is (R. 16):

> "Senator Walsh of Montana: Since you were on the stand last Mr. John C. Shaffer told us about an agreement between yourself and Secretary Fall, under which Mr. Shaffer was to receive from you a certain portion of the territory covered by the lease which you secured for the Mammoth Oil Co. Will you tell us about that matter?"

And the innuendo is that by the question was meant to elicit from Mr. Sinclair

> "facts which then were within his knowledge touching the making of a certain oral agreement"

with Secretary Fall; that the lease then under negotiation would covenant to set aside certain land for the benefit of the Shaffer referred to in the question, which Sinclair knew was a pertinent question. (R. 16.) Like the other question there is nothing on the face of it to show any pertinency to any imaginable legislation, whatever the interpretation placed on the question. Like the other, it is clearly open to at least two meanings, that is, a query about the testimony of Mr. Shaffer and a query about the agreement with Secretary Fall. The latter

might be pertinent to the judicial inquiry. The innuendo says it was the latter. It also might very reasonably be supposed to be calling for a description of the particular territory Mr. Shaffer was to receive. But here again the innuendo fails absolutely to indicate the nature of the "facts" sought respecting the oral agreement. Perhaps the conversation was in French; that would be a "fact," and would fit the pleader's description. Yet, what possible pertinency could it have?

Proceeding to the fifth count (R. 17), the question is:

> "Senator Walsh of Montana: Mr. Sinclair, will you tell the committee where and when you met Secretary Fall during the months of November and December last?"

And the innuendo is that what was meant and understood was to elicit facts

> "touching conferences theretofore had between said Harry F. Sinclair and said Albert B. Fall, who had been Secretary of the Interior of the United States, who had been a witness before the said Committee and had testified to certain facts, the truth whereof the said Committee was desirous to establish in the determination of further facts touching the execution and delivery"

of the lease of April 7, 1922. The innuendo adds nothing to the description of the "facts" that shows them to be pertinent to any legislative inquiry. The question here is clear enough as to what the facts sought were; that is, when and where in November and December, 1923, Mr. Sinclair met Mr. Fall (long after the execution of the leases and after Mr. Fall's retirement from office on March 4, 1923. (R. 156.) Suppose the answer to the

question was "November 15th and December 15th, 1923, at the Shoreham Hotel each time." How could that possibly aid the Committee in recommending legislation? Of course it is easy to see how a response to this question might furnish some information which might be thought by Senator Walsh to be very helpful to the Government's special prosecutors of the civil and criminal proceedings instituted pursuant to Joint Resolution 54. For illustration, in those litigations, if it were considered that Mr. Fall's testimony was not likely to be helpful to the Government, it might be thought desirable to attempt to discredit it by insinuating that it had been influenced by Mr. Sinclair, which insinuation might have some weight if meetings between them were known to have occurred, but would fall flat if the fact was that no such meetings had occurred.

In the remaining count, the ninth (R. 21), the question is:

> "Senator Adams: Mr. Sinclair, I believe in an earlier hearing you testified, in answer to a question, that you had in no way, and none of your companies had in any way, given or loaned anything to Secretary Fall. Is that correct?"

Again, the question is wide open to two constructions; that is: Is that a correct statement of Mr. Sinclair's previous testimony, or was the previous testimony correct? The innuendo points rather towards the latter; that is, that there was designed to be elicited facts within Mr. Sinclair's knowledge

> "touching the circumstances under which said lease of April 7, 1922, had been made, and the question whether any improper or unlawful means

or influence had been used in the procurement of said lease;".

The latter part of the innuendo is not quite intelligible, that is, "to elicit * * * facts * * * and the question"; but, assuming the sense of it to be as implied by the first part, what possible bearing on prospective legislation could an answer have? Suppose the answer were "Yes", or suppose it were "No"; the consequence would be the same from a legislative viewpoint in either case.

Here, again, however, there is a perfectly clear relation, on the construction of the question asserted, not only to the civil litigation in the courts, but the criminal investigation about to be instituted by the special grand jury which was being organized at the time the question was propounded to the witness before the Committee.

One cannot read these questions without becoming incensed at the unfairness of them in the existing situation. "It is abhorrent to the instincts of an American." (Mr. Justice BRADLEY, in *Boyd* v. *United States*, 116 U. S. 616, 631.) But of course it is not merely unfair, it is lawless. It is a question of law, and that question is, can this Court see in any of these four questions, aided as much as they can be by the innuendoes, given any construction most favorable to the prosecution, any reasonable degree of pertinency to any reasonably conceivable legislation the Committee could recommend. Of course *that* is not the standard to judge by. An indictment must be certain. If the questions are open to two meanings, it is not certain. But, favoring them with every intendment, how possibly can they be *seen to be pertinent?* It must be *seeable* to the court, not merely *imaginable*. The charge is that they *are* pertinent, not that they *might be* pertinent, and the Court has to be shown by proper averments that *they are pertinent* for the indictment to be good.

The learned Judge of the Court below who passed upon the demurrer clearly recognized the faultiness of the averment of pertinency in failing to charge facts constituting a crime, but relied on the pleader's purely legal conclusion that the questions were pertinent, as will be seen by his memorandum opinion. (R. 48, 49.) But, curiously enough, the Court fell into a quite understandable error when he came to apply his ruling, with the result that he dismissed but three counts instead of all of them, as should have been done upon the proper application of his holding. The Court had reached the conclusion that the pleader's bare legal conclusion of pertinency was insufficient; but when he came then to an examination of the various counts he seemed to have subjected them to the test of whether any of them showed on their face that they were *not* pertinent, dismissing such as did, leaving stand the others; in effect having imposed upon the defendant the burden of establishing or convincing the Court of the impertinency of each count, instead of imposing the burden where it belonged, upon the prosecution to establish convincingly to the Court that the questions were in fact pertinent.

Point II.

The Court Erred in Overruling the Motion of the Defendant Below to Direct the Jury to Return a Verdict of Not Guilty, Because the Questions Propounded to the Defendant Below Called for Testimony Relating Solely to His Private Business and the Committee had no Jurisdiction to Make Such an Inquiry, and the Witness Rightfully Refused to Answer the Questions.

Upon the conclusion of the whole evidence the defendant below moved the Court to instruct the jury to return a verdict of not guilty on each of the remaining

counts of the indictment (R. 137-8), which motion was by the Court overruled. (R. 138, 157.)

This motion necessarily involved the question as to whether the Committee could lawfully interrogate the witness concerning his private business, and we maintain that such an inquiry was beyond the jurisdiction of the Committee, and the witness rightfully refused to answer the questions, and it was error to deny the motion for a directed verdict.

It was settled by the decision in the case of *Kilbourn* v. *Thompson*, 103 U. S. 168, that neither House of Congress possesses a "general power of making inquiry into the private affairs of the citizen;" that the power actually possessed is limited to inquiries relating to matters of which the particular House "has jurisdiction" and in respect of which it rightfully may take other action; that if the inquiry relates to "a matter wherein relief or redress could be had only by a judicial proceeding" it is not within the range of this power, but must be left to the courts, conformably to the constitutional separation of governmental powers.

McGrain v. *Daugherty*, 273 U. S. 135.

In the case of *McGrain* v. *Daugherty*, *supra*, the Court said, (p. 154), that the two principal questions involved were:

> "(a) Whether the Senate—or the House of Representatives, both being on the same plane in this regard has power through its own process to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution, and

> "(b) Whether it sufficiently appears that the process was being employed in this instance to obtain testimony for that purpose."

There was no question raised with respect to an inquiry into the private affairs of the witness who had refused to appear. Indeed there could have been none, because he had not appeared and no questions had been asked him, so that the case of *McGrain* v. *Daugherty, supra*, does not answer or suggest an answer to the question presented here, and as to which the Court of Appeals sought instructions. (R. 191.)

This precise question has not been fully answered by any decision of this Court.

In the case of *Kilbourn* v. *Thompson, supra*, it having been definitely decided that neither House "possesses the general power of making inquiry into the private affairs of the citizen," the question here presented is whether, while engaged in an inquiry conducted ostensibly in aid of legislation a committee of Congress may compel a witness to disclose his private affairs.

In *Re Pacific Railway Commission*, 32 Fed. 241, Mr. Justice Field, speaking for the Court, said, (p. 250):

> "It (Congress) may inquire into the extent of the productions of the country of every kind, natural and artificial, and seek information as to the habits, business and even amusements of the people. But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters. In the pursuit of knowledge it cannot compel the production of the private books, and papers of the citizen for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose,

> and in both cases only upon averments that its rights are in some way dependent for enforcement upon the evidence those books and papers contain."

In the case of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, commenting upon the powers of Congress, this Court said, (p. 478):

> "In accomplishing the objects of a power granted to it Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution. We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen."

In the case of *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, this Court, in limiting the powers of the Interstate Commerce Commission concerning compulsory testimony in inquiries relating to specifically alleged breaches of the statutes, said, (p. 419):

> "the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary,—those where the investigations concern a specific breach of the law."

In that case the Court further said, (p. 421):

> "We could not believe, on the strength of other than explicit and unmistakable words, that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed."

In *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, the Court said, (p. 444):

> "The appellant's refusal to answer the series of questions put was not based upon any objection to giving much of the information sought, but on the ground that the counsel who put them avowed that they were the beginning of an attempt to go into the whole business of the Armour lines,—a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up. This was beyond the powers of the Commission."

In the case of *Federal Trade Commission* v. *P. Lorillard Tobacco Co.*, 264 U. S. 298, where it was contended that the Commission had unlimited power to compel testimony, notwithstanding it was not proceeding in its quasi-judicial capacity, this Court said, (p. 305):

> "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire. (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479), and

to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

Kilbourn v. *Thompson*, 103 U. S. 168;
McGrain v. *Daugherty*, 273 U. S. 135;
Re Pacific Railway Commission, 32 Fed. 241;
Interstate Commerce Commission v. *Brimson*, 154 U. S. 447;
Harriman v. *Interstate Commerce Commission*, 211 U. S. 407;
Ellis v. *Interstate Commerce Commission*, 237 U. S. 434;
Federal Trade Commission v. *P. Lorillard Tobacco Co.*, 264 U. S. 298.

Point III.

The Court Erred in Overruling the Motion of the Defendant Below to Direct the Jury to Return a Verdict of Not Guilty, Because the Questions Propounded to the Defendant Called for Testimony Relating Solely to Matters Cognizable Alone by the Courts, Which Were at the Time Pending in the Courts, and the Committee had no Jurisdiction to Inquire into Such Matters, Wherein Relief or Redress Could be had Only in a Judicial Proceed-

ing, and the Witness rightfully Refused to Answer Such Questions.

We may be permitted to again call attention to the fact that the case of *McGrain* v. *Daugherty, supra*, did not present this question. We are concerned here with the question as to whether a witness appearing before a Committee of Congress authorized to compel evidence in an investigation conducted in aid of its legislative duties may rightfully refuse to answer questions concerning matters wherein relief or redress could be had only by judicial proceeding. This assumes that the Committee of Congress is duly authorized to conduct the investigation, that the witness is properly before the Committee and legally bound to answer questions propounded by the Committee relating to the matters of which the Committee has jurisdiction, and that the Committee, departing from the matters to which its inquiry is confined by constitutional limitation, asked questions of the witness concerning matters as to which relief or redress could only be had in a judicial proceeding.

It is clear from the case of *Kilbourn* v. *Thompson, supra*, (p. 193), that "if the investigation which the Committee was directed to make was judicial in its character and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding," it would be without jurisdiction. The question here is: If the investigation the Committee was directed to make was legislative in its character but the Committee departed from the legislative limitation and propounded questions concerning matters "wherein relief or redress could be had only by a judicial proceeding," could the witness, because of such departure, rightfully refuse to answer the questions? Since the refusal to answer may subject the witness to indictment and pros-

ecution, it would seem that the questions which he refused to answer must be clearly within the constitutional power of the Committee, as well as pertinent to the matters being investigated under that power.

Indeed in the very recent case of *McGrain* v. *Daugherty, supra*, this Court said, (p. 176):

> "it is a necessary deduction from the decisions in *Kilbourn* v. *Thompson* and *Re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

Point IV.

The Court Erred in Overruling the Motion of the Defendant Below to Direct the Jury to Return a Verdict of Not Guilty, Because, Even Though the Committee Were Authorized to Make an Investigation in Aid of Legislation, the Questions Propounded to Defendant Below Inherently Disclose, and the Colloquy in the Committee Conclusively Establishes, That It had Avowedly Departed from any Inquiry in Aid of Legislation and Was Seeking Information Upon Matters Which had Been Referred to the Courts, Where Alone Relief or Redress Could Be had and Where the Witness Was a Defendant; and Therefore the Committee had no Jurisdiction of the Matters Covered by the Questions and the Witness Rightfully Refused to Answer.

It appears from the Record herein (R. 82, 83) that the Committee caused a telegram, signed by the Sergeant at Arms, to be delivered by the United States Marshal for the Southern District of New York to defendant Sinclair, directing him to appear before the Senate Com-

mittee on Public Lands and Surveys for the purpose of giving testimony and producing papers on March 19, 1924; that when he appeared he made a statement to the Committee (R. 123-128), the accuracy of which is not questioned. In this statement Mr. Sinclair said that he had been called before the Manufacturers Committee in January of 1923, and in response to said summons had produced all books and papers called for and testified fully regarding the lease of Teapot Dome and the organization of the Mammoth Oil Company, which held that lease; that on October 29, 1923, he was called before the Committee on Public Lands and Surveys and answered all questions propounded to him in respect to the lease of Teapot Dome and the Organization of the Mammoth Oil Company and was excused; that in the afternoon of the same day he was recalled and answered all questions put to him by the Committee and was again excused; that on December 4, 1923, he was again summoned by the Committee and answered all questions put to him and had his Auditor present who also testified; that he was requested to furnish the Committee with certain papers and memoranda, which was accordingly done; that on December 27, 1923, he was again summoned before the Committee and answered all questions put to him and produced all books and papers asked for by the Committee; that he was then excused until the fourth of January, 1924, on which date he again appeared and answered all questions put to him by the Committee and produced all books and papers called for, and on that day was finally excused from further attendance. (R. 128.)

The witness further said that when he appeared before the Committee at the dates given above and answered their questions and produced all books and papers asked for, the Committee was acting under Senate Resolution 282, of the Sixty-seventh Congress, which authorized it

"To investigate the entire subject of leases upon Naval oil reserves with particular reference to the protection of the rights and equities of the United States and the preservation of its natural resources;"

and that since his last appearance before the Committee, and at the instance of the Committee, the Senate and House had passed Joint Resolution No. 54, which had been signed by the President, and he made that resolution a part of his statement to the Committee.

That resolution, in effect, denounced the lease between the Government and the Mammoth Oil Company, of which Mr. Sinclair was President, as void because of fraud and corruption and for want of lawful authority on the part of the Secretary of the Navy and the Secretary of the Interior to execute it. Mr. Sinclair called the attention of the Committee to the fact that this was an assertion under the rights and equities of the United States referred to in the resolution under which the Committee was conducting the investigation, that the land covered by the lease of Teapot Dome belonged to the United States; that the resolution further asserted that the lease was made "in defiance of the settled policy of the Government, adhered to through three successive administrations, to maintain in the ground a great reserve supply of oil, adequate to the needs of the Navy, in any emergency threatening the national security." Mr. Sinclair pointed out that this was an outline of the policy of the Government with respect to the "preservation of its natural resources," referred to in the Resolution under which the Committee was conducting the investigation.

Mr. Sinclair further pointed out to the Committee that Senate Resolution 54 provided:

> "That the President of the United States be, and he hereby is, authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of the said leases and contract and all contracts incidental or supplemental thereto; to enjoin the further extraction of oil from the said reserves under said leases or from the territory covered by the same; to secure any further appropriate incidental relief; and to prosecute such other actions or proceedings, civil and criminal, as may be warranted by the facts in relation to the making of said leases and contract." (R. 125.)

And that the President was authorized to employ counsel to prosecute such litigation, and that in another resolution initiated in the House, $100,000 was appropriated to cover the expenses of such litigation.

Mr. Sinclair called the attention of the Committee to the fact that the President, by and with the advice and consent of the Senate, had appointed counsel, who were duly sworn and took their oaths of office as Special Counsel to the Government authorized by said Senate Joint Resolution No. 54, and that the said counsel by bill of complaint in the District Court of the United States for the District of Wyoming, had sued the Mammoth Oil Company, the holder of the lease, the Sinclair Crude Oil Purchasing Company and the Sinclair Pipeline Company and applied for relief by temporary injunction and receivers, which was granted.

He further called the attention of the Committee to the fact that in the bill of complaint it was charged that:

> "In negotiating and concluding said agreement said Albert B. Fall and said Harry F. Sin-

clair, acting for and on behalf of the defendant Mammoth Oil Company, did fraudulently and covinously combine, confederate and conspire, in the manner and in the acts hereinabove set forth and other matters and things, to defraud the United States of America:

"(a) By granting said lease upon said naval petroleum lands in violation of law;

"(b) To favor and prefer said defendant Mammoth Oil Company over and above other persons desirous of taking lease upon said lands;

"(c) To insure to said defendant Mammoth Oil Company the valuable right to receive and take to exhaustion all of the oil and gas which might be obtained from said lands in said agreement mentioned;

"(d) To lease the said lands to said defendant Mammoth Oil Company by said agreement at an inadequate, improper and fraudulent consideration." (R. 126.)

Mr. Sinclair further called the attention of the Committee to the fact that the Special Counsel acting for the Government had announced officially that application had been made for the organization of a special Grand Jury in the District of Columbia, for the purpose of inquiring into offenses and crimes growing out of the circumstances attending the execution of this lease.

Mr. Sinclair then respectfully submitted to the Committee that:

"It is perfectly clear, therefore, from the language of the resolution that your Committee by reason of any constitutional power which it may possess or by virtue of the resolution under which it is acting is not now engaged, nor could

it be engaged in an investigation 'with particular reference to the protection of the rights and equities of the United States and the preservation of its natural resources;' because the Senate, from whom you derive your authority, has unanimously passed upon all questions embraced within that authorization and exhausted whatever power or authority it had in the premises." (R. 127.)

He further submitted to the Committee that:

"It is further perfectly clear that the Congress and the President have made of the whole matter a judicial question, determinable solely by the courts of the country, and such question is now actually pending in the District Court of the United States for the District of Wyoming and whatever criminal act is claimed is about to be investigated by a Special Grand Jury of the District of Columbia." (R. 127.)

He further said:

"With due respect to your Committee, I claim that you are without any jurisdiction to question me further regarding the procurement of the lease or the validity thereof or any fact or circumstance pertaining thereto; that such an examination of me by your committee would not only be clearly outside of your jurisdiction but would be, in effect, an examination before trial in a civil action between the Government and the Company I represent, by a body of men wholly unauthorized by law and in a wholly unauthorized manner. Or, if your examination should be directed toward eliciting facts concerning fraud or corruption

your Committee in effect would have constituted itself a grand jury as to a matter which Congress and the President, by Joint Resolution No. 54, have directed should be presented to the constitutional authorities of the country." (R. 127.)

Upon the completion of Mr. Sinclair's statement to the Committee, a motion was made to proceed with the examination of Mr. Sinclair, and Senator Bursum offered an amendment providing that the "examination shall not relate to any matter now pending in the Federal court in which case Mr. Sinclair may be a defendant." This motion led to a discussion. This discussion is set out in full in the Record. (R. 115-122.) The concluding part of the colloquy in the Committee is as follows:

"The Chairman: Will you state your motion again, Senator Bursum?

"Senator Bursum: My motion was that in the examination the inquiry shall not relate to pending controversies before any of the Federal courts in which Mr. Sinclair is a defendant, and which questions would involve his defense.

"Senator Dill: Mr. Chairman, before that motion is put, if that motion is carried, does not that preclude questions regarding the Mammoth Oil Co. and the Sinclair companies and the handling of their stocks and the transactions in connection with them?

"Senator Bursum: Well, it relates to the case.

"Senator Dill: Then, we should vote this question down.

"Senator Walsh of Montana: Of course we will vote it down. It is the same thing as the general proposition. If we do not examine Mr.

> Sinclair about these matters, there is not anything else to examine him about. Then I have not anything else that I want to examine him about." (R. 149.)

An examination of the questions which were thereafter put to Mr. Sinclair and for the refusal to answer which he has been convicted, taken in connection with the innuendos showing the purposes of such questions, incontestibly establishes that by no conceivable interpretation could they relate to anything except the matters which had been by Senate Joint Resolution 54 referred to the courts and of which the courts had taken jurisdiction.

From this narrative of events which took place before the Committee, it is clear:

1. That Mr. Sinclair had, on repeated occasions, obeyed the summonses of the Committee, appeared before it, testified fully and produced all books and papers required;

2. That he never declined to testify or to produce books and papers until summoned on March 19, 1924, though he had been in attendance upon said Committee from time to time since October, 1923; and that he rested his declination to testify upon the ground that the Committee was without jurisdiction to inquire into the matters attending the execution of the lease of Teapot Dome and directly affecting the validity of said lease because Congress, by Senate Joint Resolution 54, had theretofore referred all of such matters to the courts, civil and criminal, wherein relief or redress alone could be had.

Moreover, we are not left in any doubt nor need we resort to any conjecture as to the matters about which the Committee intended to inquire, for in the presence of Mr. Sinclair and his counsel and before the questions had been propounded to him, and after the discussion of

a motion made by Senator Bursum to confine the inquiry to the constitutional legislative function of the Committee, and not push the inquiry over and into those matters which Congress had referred to the courts and over which the courts had taken jurisdiction, and clearly outside of the jurisdiction of the Committee, Senator Walsh announced:

> "If we do not examine Mr. Sinclair about these matters" (meaning the matters which had just been discussed, which were involved in the case brought by the Government of the United States against the Mammoth Oil Company) "there is not anything else to examine him about. Then I have not anything else that I want to examine him about." (R. 149.)

From this the witness had a clear right to conclude that Senator Walsh, as examiner for the Committee, it having voted down the Bursum motion, had no other purpose in questioning him than to probe into the questions involved in the litigation pending and impending between the United States Government and Mr. Sinclair or his companies.

We have a situation where a motion was made to confine the inquiry within the constitutional power of the Committee as it has been recognized in the case of *McGrain* v. *Daugherty, supra*, a prompt voting down of that motion and an unequivocal avowal by the authorized examiner on behalf of the Committee that he had no other questions to ask upon any other subject than the subject of the litigation. If anything else were required to demonstrate that the Committee deliberately departed from its constitutional jurisdiction and deliberately entered upon an inquiry beyond the bounds of its power into matters already lodged with a co-ordinate

branch of the Government for disposition, the questions themselves furnish that demonstration.

The resolution under which the Committee was acting, authorizing it

> "to investigate this entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the Senate." (R. 9.)

in and of itself required an investigation which was essentially judicial in so far as it related to the "rights and equities of the Government of the United States," under leases upon naval oil reserves. Senate Joint Resolution 54 fully comprehended the results of its inquiries with respect to the "rights and equities" of the Government of the United States under leases upon naval oil reserves, attempted to define the rights of the United States therein, characterized the procurement thereof, settled the future policy of the Government with respect to the maintenance of a reserve supply of oil in the ground, and finally determined that the whole question was a judicial one requiring the institution of proceedings, civil and criminal, in the courts.

In the case of *Kilbourn* v. *Thompson*, *supra*, the resolution adopted by the House authorizing the investigation recited in the preamble that "the courts are powerless, by reason of said settlement to afford adequate redress to said creditors." In the case here presented the Congress, by Senate Joint Resolution 54, had not only concluded that the "courts were not powerless" but had recognized that only in the courts could adequate relief and redress be had, and had definitely sent

the whole matter to the courts for such relief and redress. In *Kilbourn* v. *Thompson*, the Court said, (p. 194):

> "The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction?"

In the case here presented the matter had been, by an Act of Congress, sent to the court, was pending there, and we may ask, by way of paraphrase:

> What right had the Committee to inquire into matters pending in a court of competent jurisdiction?

Again the Court says, (p. 194), in the case of *Kilbourn* v. *Thompson*,

> "The case being one of a judicial nature, for which the power of the courts usually afford the only remedy, it may well be supposed that those powers were more appropriate and more efficient in aid of such relief than the powers which belong to a body whose function is exclusively legislative."

This Court, in the case of *McGrain* v. *Daugherty*, *supra*, said, (p. 175):

> "The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might

> be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon* point to admissible measures of relief. *And it is a necessary deduction from the decisions in Kilbourn* v. *Thompson and Re Chapman that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.*" (Italics ours.)

The case here presented falls naturally and directly within the declaration, "that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." There was and is no way provided by which a witness appearing before a committee of Congress may have the question of the power of the committee, or the pertinency of the questions propounded, determined judicially before he finally answers or declines to answer. Mr. Sinclair's declination in this case speedily resulted in his indictment and trial. It is reasonably certain if his right to refuse to answer the questions propounded as being in excess of the power of the Committee and not pertinent to the inquiry could have been submitted to a court in advance, he would have been relieved of the obligation to answer.

In the case of *McGrain* v. *Daugherty, supra*, this Court said that the second important question involved therein was whether it sufficiently appeared that the process was being employed to obtain testimony to enable the com-

mittee to exercise a legislative function belonging to it under the Constitution. In that case, it will be recalled that the Court pointed out that the investigation was aimed at one of the great Departments of the Government, to-wit, the Department of Justice; that while the resolution did not in terms avow that it was intended in aid of legislation, it showed that the subject to be investigated was the administration of the Department of Justice and that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants were all subject to regulation by Congressional legislation, and the Department is maintained and its activities are carried on under appropriations provided by Congress from year to year. This Court was careful on that branch of the case to say, (p. 160):

> "we are not now concerned with the right of the Senate to propound or the duty of the witness to answer specific questions, for as yet no questions have been propounded to him. He is asserting—and is standing on his assertion—that the Senate is without power to interrogate him, even if the questions propounded be pertinent and otherwise legitimate—which for present purposes must be assumed."

This Court further said, (p. 178):

> "The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable."

In the case presented here there is no room for any presumption with respect to the intention of the Committee in propounding the questions nor in eliciting the information. There is no room for a presumption that the object of the questions was to elicit information to aid it in the discharge of a legislative duty, because a formal motion was made to confine the Committee inquiry into matters which would aid it in its legislative duties; the motion was discussed by the Committee and the colloquy and final conclusion of the Committee clearly disclose that the object of the Committee was to inquire into the facts and circumstances attending the making of the lease, the inquiry and appraisement of which had already been by an Act of Congress lodged with the courts.

At the very opening of the colloquy, Senator Dill, in discussing the motion made by Senator Bursum that the examination should not relate to any matter pending in the Federal courts, said:

> "Mr. Chairman, that is the same thing as saying that he shall not be called, because the Committee has no interest in anything except the cases before the court." (R. 148.)

Senator Walsh said:

> "If we do not examine Mr. Sinclair about these matters, there is not anything else to examine him about. Then I have not anything else that I want to examine him about." (R. 149.)

This court in *McGrain* v. *Daugherty*, *supra*, referring to the second resolution which directed that the witness Daugherty be attached, said, (p. 180):

"The second resolution—the one directing that the witness be attached—declares that his testimony is sought with the purpose of obtaining 'information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.' This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of 'other action' if deemed 'necessary or proper' is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed."

In the case here presented we maintain that an inadmissible and unlawful object was affirmatively and definitely avowed. It is conceivable that a witness appearing before a Committee of Congress might be asked questions which, while directly relating to litigation pending in the courts, might at the same time bear upon some discernable contemplated legislation; but in the case here presented, if we take the unquestioned statement of Mr. Sinclair to the Committee which shows his many appearances and examinations between October, 1923, and March, 1924, with the production of his books and papers, which shows that prior to his appearance and declination to answer in March, 1924, the Congress had passed Senate Joint Resolution 54, referring all matters growing

out of the lease of Teapot Dome to the courts, civil and criminal, for disposition; if we consider the colloquy between the members of the Committee, in the presence of Mr. Sinclair, and the decision of the Committee after the colloquy as to the line of inquiry intended and about to be proceeded with, and if we take the questions which followed and for the refusal to answer which Mr. Sinclair was convicted, the conclusion seems irresistable that the questions related to matters beyond the bounds of the Committee's power that the purpose of the Committee in propounding the questions was affirmatively and definitely avowed, and the witness rightfully refused to answer.

Point V.

The Court Erred in Overruling the Motion of the Defendant Below to Direct the Jury to Return a Verdict of Not Guilty, Because There Was no Proof of an Authorized Inquiry, a Legal Summons, or Duly Administered Oath.

Assignments of error in the Court below numbered 1 to 5, inclusive, and 12 to 16, inclusive (R. 56, 57, 157, 158), and assignments of error 44 and 45 (R. 60), will be dealt with under this Point. They are, in substance, the refusal of the Court to instruct a verdict for the defendant, for lack of evidence to establish the essential ingredients of the offense; and denial of requested instructions to the jury to the same effect.

As has been seen under Point I, it is well settled that the refusal to answer a question in *any* inquiry of a Senate Committee is not necessarily an offense under the statute; and that the only character of inquiries in which the Senate has power to compel testimony are those inquiries of a quasi-judicial nature, such as impeachments

committed to it by the Constitution, inquiries respecting its members and their conduct, and inquiries in aid of legislation. It is not contended by the Government that any inquiry of the former classes is involved, but rather one only in aid of legislation.

Notwithstanding an absurd contention by the Government to the contrary on the trial, it is of course obvious that no Committee, any more than an individual Senator, has any power to require testimony on any subject within the proper jurisdiction of the Senate itself without express authorization from the Senate. The power, so far as legislation is concerned, is not an express power, to begin with, but only an implied power in aid of the constitutional function of legislation (*McGrain* v. *Daugherty*, 273 U. S. 135), itself, a power only of the whole Senate as a body, not of the committees or individual members. But, in any event, discussion of the abstract problem is unnecessary, for the simple reason that the express provision of the statute here is

> "Every person who having been summoned as a witness by the authority of either House * * *" (R. S. 102; U. S. C. A., Sec. 192).

It is not even pretended that there is, by standing rule, or even practice, a general authorization on the part of the Senate to Committees to summon witnesses. On the contrary, the uniform practice of the Senate is to adopt a resolution authorizing and instructing a Committee to conduct an inquiry; such resolution either expressly authorizing the requiring of testimony, when such may be the will of the Senate, or containing no such authorization, if that may be its will. An illustration can be found in the very resolutions here in question. The first one, S. R. 282 (R. 8), it will be observed, contains no authorization to summon witnesses. Presumably it may have

been supposed that the papers sent for would themselves be sufficient to inform the Committee which was to consider them. If an examination of the papers called for by the Senate, after their receipt, indicated that additional information was desirable — as apparently proved to be the case—an additional resolution (S. R. 294) was adopted a few weeks later expressly authorizing the requiring of testimony (R. 9). It will be observed that S. R. 294 also contained an authorization to the chairman of the Committee or any member to administer oaths and sign subpoenas for witnesses. (R. 9.)

The further absurd contention was made upon the trial that by virtue of Section 101 of U. S. Revised Statutes (U. S. C. A., Sec. 191), any member of either House may administer oaths to witnesses in any matter depending therein or before any Committee thereof, without any authorization by the particular House, that is, by virtue of that statute alone. The obvious purpose of that statute of course is merely to capacitate the members to administer oaths. It is elementary that an oath, to be a legal oath in any situation, must be one authorized by law. The Senate alone of course cannot make laws. Consequently, it was necessary that a law be enacted by the two Houses which would simply capacitate a certain class of persons to administer oaths in authorized circumstances. Would it not be absurd to contend that a general statute of the United States making notaries public competent to administer oaths, authorized such notary public thereby to constitute himself a court and swear witnesses and try causes? Yet, that is the effect of the Government's contention; that because of Section 101 of the Revised Statutes any Senator, without any further authority from the Senate, could on his own initiative seize a bystander, swear him as in a pending inquiry in the Senate, and thus make him liable to the penalties of Section 102 of U. S. Revised Statutes (U. S. C. A., Sec. 192), for refusal to answer.

It is clear, therefore, that the offense denounced by the statute here involved can be committed before the Senate itself only when that body may be engaged upon an inquiry in the discharge of its constitutional quasi-judicial functions or in aid of its legislative functions; and before any Committee of the Senate only when such Committee has not only been authorized to undertake the inquiry, but also had delegated to it "the authority of" the Senate to summon and swear witnesses and require their testimony. For the sake of brevity, such an inquiry will hereinafter be referred to as an authorized inquiry, in either case; including of course in the case of the Committee such a delegation of authority.

Having in mind that fundamental principles of the criminal law require that every essential ingredient of the offense must not only be alleged in the indictment, as has already been shown under Point I of this brief, but also upon the trial must be *proven* as alleged, and that beyond a reasonable doubt, and that the accused is entitled to the presumption of innocence (*Agnew* v. *United States*, 165 U. S. 36; *Underhill on Criminal Evidence* (2nd ed.), pp. 35, 40; *3 Bishop's New Criminal Procedure* (2nd ed.), p. 818) it is desirable again to observe what are the essential ingredients of the offense attempted to be charged in the indictment, with a view to seeing whether they have been so proved.

These essential ingredients are:

(1) The pendency before the Committee of an *authorized* inquiry.

(2) That the accused was *legally* summoned to appear before said Committee.

(3) That the accused, having appeared, was *duly* administered an oath by an authorized person.

(4) That questions were propounded to the accused *by the Committee* which were *pertinent* to such authorized inquiry.

(5) That the accused refused to answer the questions propounded.

It is confidently asserted that there is an utter failure of proof of every one of these essential ingredients, save that the accused refused to answer the questions set out in the indictment.

It may be observed at the outset that the trial Court ruled that the question of whether the Committee was authorized, whether the summoning was legal, and whether the administration of the oath was by an authorized person and in force March 22, 1924, were all questions of law for its decision, and he decided them affirmatively; pursuing a like course with respect to the question of pertinency of the questions, the Court did not submit its findings as instructions to the jury, but submitted to it only the questions of fact whether the accused was summoned (regularly or irregularly), whether he appeared, whether he was sworn as a matter of fact, and whether he was asked the questions and refused to answer them. (R. 170.)

The question of the propriety of that procedure is dealt with in a subsequent Point, and, for the purposes of the argument here, it will be assumed that the questions determined by the Court are wholly questions of law; although it is later contended, and it is thought demonstrated, that they are really mixed questions of law and fact.

The questions involved were propounded and answers thereto refused on March 22, 1924 (R. 89). It is not pretended that the accused was sworn by any one on that date or at any other time subsequent to the adoption of S. R. 147 of February 7, 1924, which was the first and only resolution containing any avowal, or hint, even, of legislative intention. What is relied on for proof of the administration of an oath is an oath administered De-

cember 4, 1923, when the Committee was proceeding under the supposed authority of previous resolutions (R. 88, 89). It is therefore quite manifest that the resolution of February 7, 1924 (S. R. 147) cannot be relied upon in any degree whatever as establishing the pendency of an authorized inquiry, as the accused was never sworn under it. In fact, as will later be pointed out, he was not even validly summoned upon his appearance March 22, 1924.

As has been seen, what is attempted to be relied upon for proof of the administration of an oath, is the oath administered December 4, 1923; and there is no proof of *any summons* having been issued or served prior to the administration of that oath, although the language of the statute is "Every person who *having been summoned* as a witness," etc. And, in any event, it must be obvious that an oath taken before the commencement of a proceeding is entirely extra-judicial as to such proceeding, and of no effect whatever therein.

It follows, therefore, that in the determination of the question of law as to whether Mr. Sinclair was legally summoned to appear and was duly sworn as a witness to testify in an authorized inquiry pending before the Committee on March 22, 1924, recourse must be had to Senate Resolutions 282 and 294, because under Senate Resolution 147, of date February 7, 1924, he was neither summoned nor sworn.

Senate Resolution 147, of February 7, 1924, was in its scope and terms an original and comprehensive mandate of the Senate to the Committee on Public Lands and Surveys, specifically directing them to make an inquiry to determine what, if any, other or additional legislation might be advisable. This resolution broadened the scope of the inquiry directed to be made by the Committee and absolutely superseded any prior resolutions on the subject. An oath taken by a witness before the

Committee under the superseded resolutions would not survive the adoption of Resolution 147, of February 7, 1924, and be binding upon the witness summoned before the Committee thereunder.

In order to bring the witness within the operation and under the condemnation of U. S. Revised Statutes, Section 102, he must have been summoned by the authority of one or the other of the Houses of Congress and must have been sworn as a witness to testify before a committee of one or the other of the Houses of Congress. It is conceded here that defendant Sinclair was not sworn as a witness on March 22, 1924, or after the adoption of Senate Resolution 147, of date February 7, 1924. If the adoption of that resolution (S. R. 147), constituted an original authorization from the Senate to its Committee to conduct an investigation and superseded all prior resolutions—as we maintain it did—the defendant Sinclair not having an oath administered to him by the Committee on March 22, 1924, and as we further maintain, not having been legally summoned to appear before said Committee, could not be held to have violated the statute by a refusal to answer questions.

Assuming, but not admitting, that the Committee were not only acting under the authorization of Senate Resolution 147, of date February 7, 1924, but as alleged in the indictment were also acting under Senate Resolutions 282 and 294, was the defendant Sinclair legally summoned to appear before said Committee and was an oath duly administered to him on December 4, 1923? The Record is barren of any evidence that he was summoned regularly or irregularly to appear on December 4, 1923, and it is clear that this is the only date and appearance on which it is pretended any oath was administered. The indictment alleges,

> "that said Harry F. Sinclair was summoned as a witness, by the authority of the Senate, to appear before said Committee at said hearings, to give testimony and produce papers, and, on December 4, 1923, did in fact appear before said Committee, at one of said hearings, to wit, at Washington, in said District of Columbia, and then and there was sworn as a witness before said Committee concerning said matters and questions so under inquiry before said Committee." (R. 12.)

There is no evidence of the service of any summons or process upon the defendant Sinclair to appear before the said Committee on December 4, 1923. The indictment (R. 12) further alleges that

> "on March 22, 1924, at Washington aforesaid, in said District of Columbia, said matters and questions then and there still being matters under inquiry before said Committee, said Harry F. Sinclair, having been theretofore, to wit, on March 19, 1924, again summoned by said Committee, by authority of the Senate, to give testimony and to produce papers, and having been sworn as aforesaid,"

meaning thereby, having been sworn on December 4, 1923.

The question now arises: What authority did the Committee have to administer an oath on December 4, 1923, the only date on which it is claimed that an oath was administered? The only source of authority relied upon to authorize the administering of an oath to a witness by the Committee on December 4, 1923, is *Senate Resolution 282, agreed to April 29, 1922, as amended by Senate Resolution 294, agreed to June 5, 1922.* (R. 78, 79.)

Senate Resolution No. 282 in effect directed the Secretary of the Interior to send to the Senate all papers relating to oil leases made in the State of California and in the State of Wyoming, and all executive orders and the files of the Department of the Interior; all correspondence, papers and files concerning applications for leases and all contracts for drilling wells. These were directed to be sent to the Senate and not to the Committee. The Senate further resolved (S. R. 282), "that the Committee on Public Lands and Surveys be authorized to investigate this entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States and the preservation of its natural resources, and to report its findings and recommendations to the Senate." (R. 78, 79.)

It is perfectly clear from this resolution that it was merely a reference to a standing committee of the Senate, without any authority from the Senate to the Committee to issue process for witnesses or to administer oaths.

Thereafter, and on June 5, 1922, and at about the end of the first session of the Sixty-seventh Congress, the Senate passed Senate Resolution 294, which was agreed to on June 5, 1922, and was as follows:

> "Resolved, That Senate Resolution 282 is hereby amended by adding at the end of said resolution the following:
>
> "'That the said committee is hereby authorized to sit and perform its duties at such times and places as it deems necessary or proper and to require the attendance of witnesses by subpoenas or otherwise; to require the production of books, papers, and documents; and to employ counsel, experts, and other assistants, and stenographers,

at a cost not exceeding $1.25 per printed page. The chairman of the committee, or any member thereof, may administer oaths to witnesses and sign subpoenas for witnesses; and every person duly summoned before said committee, or any subcommittee thereof, who refuses or fails to obey the process of said committee or appears and refuses to answer questions pertinent to said investigation shall be punished as prescribed by law. * * *." (R. 79.)

It appears clearly from this Senate Resolution 294, which was an amendment to Senate Resolution 282, that the Committee for the first time was authorized by the Senate to issue subpoenas for witnesses, compel their attendance and administer oaths.

It further appears from the evidence that at about the end of the second session of the Sixty-seventh Congress, and on February 5, 1923, the Senate adopted Senate Resolution 434, which reads as follows:

"Resolved, That Senate Resolution 282, agreed to April 21, 1922, and *Senate Resolution 292, agreed to May 15, 1922,* authorizing and directing the Committee on Public Lands and Surveys to investigate the entire subject of leases upon naval oil reserves, with particular reference to the protection of the rights and equities of the Government of the United States, and the preservation of its natural resources, and to report its findings and recommendations to the Senate and providing that the expenses of such investigation be paid from the contingent fund of the Senate, be, and the same are, continued in full force and effect until the end of the Sixty-eighth Congress.

"The committee or any subcommittee thereof is authorized to sit during the sessions or the re-

> cesses of the Senate, and after the expiration of the present Congress until the assembling of the Sixty-eighth Congress, and until otherwise ordered by the Senate." (R. 79, 80.) (Italics ours.)

From that resolution it is clear that **Senate Resolution 282, agreed to April 21, 1922**, and **Senate Resolution 292, agreed to May 15, 1922**, were intended to be and were continued in full force and effect until the assembling of the Sixty-eighth Congress and until otherwise ordered by the Senate.

It was stipulated (R. 156) that the Sixty-eighth Congress of the United States assembled and the first session of that Congress began on **Monday, December 3, 1923**. It will be remembered that it is charged in the indictment that on the following day, **December 4, 1923**, the defendant Sinclair was sworn as a witness before said Committee.

It is likewise clear that **Senate Resolution 294, agreed to June 5, 1922, was not continued in full force and effect** by any action of the Senate, either under Senate Resolution 434 or otherwise, **and it is from that Resolution 294, agreed to June 5, 1922, and from that alone, that the Committee claimed to derive any authority to legally summon a witness or to administer an oath when the defendant Sinclair appeared before the Committee on December 4th. In other words, without the authority conferred by Senate Resolution 294, agreed to June 5, 1922, the Committee concededly would not have had the authority to summon witnesses and compel their appearance and administer oaths on December 4, 1923.** The resolution under which it is claimed in the indictment and by the Government elsewhere that the Committee continued to enjoy its authority under **Resolutions 282 and 294** is Senate Resolution 434, agreed to February 5, 1923, from which it appears without ambiguity that the Senate re-

solved "**that Senate Resolution 282, agreed to April 21, 1922, and Senate Resolution 292, agreed to May 15, 1922,**" should be continued in full force and effect. No offer was made of Senate Resolution 292, agreed to May 15, 1922, which was the only resolution in conjunction with Senate Resolution 282, agreed to April 21, 1922, continued in full force and effect by Senate Resolution 434 until the assembling of the Sixty-eighth Congress and until otherwise ordered by the Senate. So that it appears that on December 4th, when the defendant Sinclair appeared before the Committee, there is no evidence that he had been legally summoned. There was at that time no resolution in effect under which the Committee was authorized to legally summon him there, nor was there any resolution in effect which authorized the Committee to administer an oath to the defendant Sinclair. **The Committee on that day sat and performed whatever duties it had solely under the authorization of Senate Resolution 282, in which the Senate did not confer upon it the authority to summon witnesses or to administer oaths.**

The Government heretofore has claimed: (1) That in adopting Senate Resolution 434, which continues in effect **Resolution 282, of date April 21, 1922,** and **Senate Resolution 292, agreed to May 15, 1922,** the Senate committed a clerical and typographical error in respect to **Senate Resolution 292, agreed to May 15, 1922,** and that it intended to continue in full force and effect **Senate Resolution 294, agreed to June 5, 1922;** (2) That the administration of an oath to a witness called before the Senate Committee is not necessary to make him a witness within the meaning of Section 102 of the Revised Statutes.

Respecting the first claim, we maintain that Senate resolutions are primarily identified by their numbers and by the dates of their adoption and that an examina-

tion of Senate Resolution 434, which continued in full force and effect **Senate Resolution 282, agreed to April 21, 1922,** and **Senate Resolution 292, agreed to May 15, 1922,** shows unmistakably that the Senate identified the resolutions intended to be continued distinctly by their numbers and by the dates of their adoption. If we examine the subject-matter of Senate Resolution 434 we find that it embodies the language contained in **Senate Resolution 282, agreed to April 21, 1922,** and does not attempt to define or to describe the subject-matter of **Senate Resolution 292, agreed to May 15, 1922.** Moreover, nothing appears in the record to show the subject-matter of Senate Resolution 292, agreed to May 15, 1922, its scope or its purpose. The claim that the Senate in continuing Senate Resolution 292, agreed to May 15, 1922, fell into a typographical or clerical error is mere argument and finds no support in the record. This question is fundamental in this case, because if the Senate Committee on Public Lands and Surveys on December 4, 1923, was not acting under an authorization of the Senate, in the form of a resolution empowering it to summon witnesses and administer oaths, then no oath was ever administered to the defendant Sinclair in any of the hearings had before the Senate Committee and he never was a witness within the meaning of Section 102 of the Revised Statutes.

We scarcely think that the second claim of the Government, that an oath was not necessary to bring the defendant Sinclair within the operation of Section 102 of the Revised Statutes requires much discussion. There is no compulsion upon the person appearing before such a Committee to testify until he has become a witness, and he cannot become a witness until he has been duly sworn.

Standing Rule XXV of the Senate provides (2) that the Committee shall continue until their successors are appointed, and (1) that they shall be appointed at the

commencement of each Congress *(Senate Manual, pp. 27, 30, 67th Congress, 4th Session; Senate Documents, Vol. 9, No. 349)*; thus automatically by the appointment of the new Committee with the new Congress, the old Committee is dissolved.

Presumably, in such circumstances, in ordinary course resolutions unacted on by a Committee at the expiration of the Congress die with the Committee, and if it is desired that the result shall be otherwise, it may be so resolved.

There is nothing in the holding of the Supreme Court in *McGrain* v. *Daugherty*, 273 U. S. 135, that the Senate is a continuing body, that conflicts with the foregoing view. Indeed, the suggestion

> "that the committee [resolution] may be continued or revived now by motion to that effect, and if continued or revived will have all its original powers" (R. 181),

is a plain implication that without special action to continue the force of resolutions from one Congress to another, they would expire, as do the committees, under the Senate Rules. And it is manifest that such was considered to be the situation in this particular instance by the action of the Senate in adopting S. R. 434 of February 5, 1923, for the express purpose of, and with no other object than, continuing the authority of S. R. 282

> "until the end of the Sixty-eighth Congress"

and authorizing the Committee to sit

> "after the expiration of the present Congress until the assembling of the Sixty-eighth Congress,

and until otherwise ordered by the Senate". (R. 10.)

Disregarding for the moment the as-is-claimed accidental failure of Senate Resolution 434 to extend S. R. 294 (the only one which authorized the compelling of testimony, and which for the foregoing reason would have expired for lack of extension upon the assembling of the 68th Congress December 3, 1923, the day before the witness was sworn), consideration will be given for the moment to the terms of S. R. 282 and S. R. 434 concerning the tenure of the authority.

S. R. 434, as seen, fixes three different, and to some extent conflicting, limits, *i. e.*, "until the end of the Sixty-eighth Congress", "until the assembling of the Sixty-eighth Congress, and until otherwise ordered by the Senate".

Now, regardless of which of these is to be deemed applicable, they are all of course subject to the implicit limitation of S. R. 282, that is, the accomplishment of the whole objective, *i. e.*, "to report its findings and recommendations to the Senate." (R. 9.)

It would be a senseless construction of the time limits authorized to construe them as authorizing an inquiry to be continued beyond the accomplishment of the purpose of the resolution; in reason, necessarily, when such objective has been accomplished short of the time limit within which it was authorized to be accomplished, the authority comes to an end.

Thus, we find that on January 7, 1924, Senator Caraway introduced Senate Joint Resolution 54 (*Congressional Record, 68th Congress, First Session, Volume 65, Part I, page 583*). That resolution (R. 130), *not* set forth in the indictment, dealing with the leases and contracts, begins with a "Whereas" reciting that the leases and agreements the subject of inquiry under S. R. 282

"were executed under circumstances indicating fraud and corruption", followed by a "Whereas" that they were entered into without authority on the part of the officers purporting to act for the Government, and followed by another "Whereas" that they were made in defiance of the settled policy of the Government to maintain in the ground a great reserve supply, and then resolves that the President be authorized and "directed" to institute suits for recovery of the land and such prosecutions, civil and criminal as may be warranted, and authorizes the appointment of special counsel. Of course these "Whereases" are nothing but an ineffectual and unwarranted adjudication, or attempted adjudication, of the validity of the leases, quite beyond the Senate's power; but they are very plainly a specific compliance with S. R. 282, in the way of attempted findings concerning the "rights and equities of the Government of the United States" called for by that resolution.

The joint resolution was immediately referred to the Committee on Public Lands and Surveys, and on Jan. 24, 1924 (*C. R. ibid., Pt. 2, 1375*), by unanimous vote of the Senate, the Committee was discharged from further consideration of the Joint Resolution. It was debated from day to day thereafter (*Congressional Record, ibid., pp.* 1518-1549, 1592-1624, 1668-1694, 1718-1729), and finally agreed to by the Senate January 31, 1924 (*Congressional Record, ibid., p.* 1729). Thus, upon the discharge of the Committee from the consideration of Senate Joint Resolution 54 there was completely accomplished the object expressed in S. R. 282.

For the purposes of this argument, it makes no difference that the Committee did go on investigating. The point is that even of it were supposed the original purpose of the resolution was legislative (which we deny), that had been completely accomplished, and the further activity of the Committee was but in seeking evidence to

support the litigation ordered instituted by the resolution. (The Joint Resolution was agreed to by the House, and was signed by the President February 8, 1924.).

On February 7, 1924 (*Congressional Record, ibid., p.* 1972), Senator La Follette, the author of the original resolution (S. R. 282), introduced S. R. 147, which is an exact counterpart of S. R. 282 and S. R. 294 combined, with the important addition of an avowal of legislative intent. In explaining the reason for the new resolution, it was shown that Mr. Fall had been called for examination by the Committee, and had appeared, and had challenged its authority upon the very ground that the previous resolutions were no longer in force, the subject-matter being embraced in Joint Resolution 54, of which the Committee had been discharged and upon which the Senate had itself finally acted. The resolution (S. R. 147) was passed immediately by unanimous consent.

As stated, S. R. 147 was co-extensive with S. R. 282 and S. R. 294 combined, an exact duplicate, save for the addition of the avowal of legislative intent. Why would a completely new resolution be passed thus covering the entire field, instead of a mere amendment to add the legislative avowal, if it were not recognized by the Senate itself that Senate Resolutions 282 and 294, having been acted upon, were no longer alive?

Again, it will be noted that upon his last appearance before the Committee on January 4, 1924, Mr. Sinclair was finally excused. (R. 151.)

Finally, we have the Committee's own interpretation, for what it is worth, as to which resolution it was proceeding under March 22, 1924, as shown by its report to the Senate of the accused's refusal to testify (*Congressional Record, p.* 4723, *March* 22, 1924): "PROCEEDING UNDER SENATE RESOLUTION 147."

Do not these facts lead more reasonably to the conclusion that the earlier resolutions had all expired before

February 7, 1924, than that they were still in force, serving no purpose whatsoever, not covered by the resolution of February 7, 1924, after that date?

But the affirmative is not upon the defendant. If there is insufficient ground definitely to draw the legal conclusion that these prior resolutions (S. R. 282 and S. R. 294) were still in force March 22, 1924, it follows that there could be no authorized inquiry pending in which the accused had been summoned and sworn as a witness—essential ingredients of the offense—on that date. Yet, on the other hand, it does not follow that, even if any of the prior resolutions were in effect March 22, 1924, there was an *authorized* inquiry afoot on March 22, 1924. To the determination of that conclusion it is necessary to consider two questions: (a) Whether the inquiry directed by S. R. 282 (carrying no legislative avowal) on its face affirmatively appears to be one in aid of legislation; and (b) if so, whether there was any authorization to require testimony. If the answer to the latter is in the negative, it is unnecessary to consider the former, so that (b) will be dealt with first.

It will be remembered that S. R. 282 carried no authority at all to summon witnesses; that some weeks after its adoption Senate Resolution 294 was adopted, which did authorize the taking of testimony. But it will be remembered that S. R. 434, which extended S. R. 282 past the end of the session, erroneously (as is claimed) failed to extend S. R. 294, the only one carrying authorization to summon witnesses.

If it be a fact, as previously contended, and as seems to be demonstrated by the fact of the adoption of S. R. 434, which would otherwise be superfluous, that authorizations do not carry over from one Congress to another, unless expressly extended, it will be seen that there was no authority after December 3, 1923 (the beginning of the 68th Congress) in the Committee to require testimony

until February 7, 1924. Can this Court with assurance say, as matter of law, that S. R. 294 carried over of its own force?

We come next to the principal question, (a) the nature of the inquiry under S. R. 282 in any event. As has been pointed out, there is no legislative avowal. That, of course, is not controlling, but nevertheless it is an important circumstance. The tenor of the resolution itself, however, the subject-matter of the inquiry, that is,

> "to investigate this entire subject of leases upon Naval Oil Reserves, with particular reference to the protection of the rights and equities of the Government,"

is hardly capable of but one construction, *i. e.* that the nature of the inquiry was purely judicial. The rights and equities of the Government in these leases could not in any manner be affected by any valid legislation. Only the courts could deal with them. The contracts were executed, delivered, and in effect. If there was fraud in their negotiation; if they were in excess of the authority of the Government officials, the courts, and the courts alone, could remedy that; no legislation could.

One cannot read the debates in the Senate with respect to this inquiry and escape the conclusion that precisely what the Senate was doing was attempting to reach a legal opinion about whether the leases were invalid for want of authority, and attempting to assemble evidence to determine whether corruption had attended their negotiation. Clearly these were not matters that the Senate could adjudicate. It fully recognized that, as will be seen by the debates in the Senate while Senate Joint Resolution 54 was pending.

At *page* 1313 of the Congressional Record (*68th Congress, First Session;* Vol. 65, pt. 2), Senator Walsh ex-

pressly refers to it as in its nature a judicial inquiry. At *page* 1592, Senator Lenroot says the Committee had never been able to come to a decision on the question of legality of the lease; again, at *pages* 1598, 1607-1611 he questioned the propriety of the Senate attempting to decide the judicial questions. The whole debate (*pp.* 1518-1549, 1592-1624, 1668-1694, 1718-1729) is replete with recognition of the judicial character of the inquiry. The propriety of attempting to declare in that resolution the invalidity of the leases, which it was recognized could be determined only in the courts, was frequently adverted to.

And it is to be remarked that the only legislation embraced in S. J. R. 54 is the authorization to the President to employ special counsel to proceed in the courts in relation to the matter; legislation which obviously could have been conceived quite without the necessity of having the Committee attempt to gather evidence for the prosecution of the litigation.

If the activities under the resolutions, as disclosed now and then by the debates reported in the Congressional Record, are to be noticed, it is obvious that the Committee had constituted itself a grand jury. For example, at *page* 1391 *(Ibid.)* Senator Heflin says:

> "The Committee is acting as a grand jury and should go on and indict—find all the facts and report them to the Senate in the indictment. We are trying to apprehend the fellow who is to be indicted and to keep him from disposing of the property of the Government which is now in his possession."

And none of the Committee in the least disagreed with him. Indeed, at times some of the Senators indulged in the less dignified role of vying with the Bureau of Inves-

tigation of the Department of Justice (*Cong. Rec., ibid., pp.* 1621-1623).

When they so far "forgot their high functions" and indulged in "such an utter perversion of their powers" (*Kilbourn* v. *Thompson*, 103 U. S. 168, 204, 205), and showed such

> "an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations,"

it is the duty of the courts to interfere.

Marshall v. *Gordon*, 243 U. S. 521, 545.

But, again, it is to be remembered that this Court is not under the necessity of finding affirmatively that the Committee were engaged in an unauthorized inquiry. The burden of proof is of course on the prosecution, and the query is, can this Court say beyond a reasonable doubt that the Committee was engaged upon an inquiry in aid of legislation? It will not do to indulge a presumption to that effect. No presumption known to the law is as strong as the presumption of innocence. No presumption can be indulged in the place of proof to establish an essential ingredient of a crime.

As was said by the Court of Appeals in *Egan* v. *United States*, 52 App. D. C. 384, 393:

> "The government is by law burdened with the obligation of proving the case set out in the indictment, in every material part, beyond a reasonable doubt; and before the jury can lawfully return a verdict of guilty they must find that every element essential to establishing guilt, has been so proven. The law demands acquittal, unless every material

and necessary fact upon which a conviction depends is proven, to the satisfaction of each individual juryman, beyond a reasonable doubt."

See, also, to the same effect:

Agnew v. *United States*, 165 U. S. 36, 49; 41 L. Ed. 624;
Clyatt v. *United States*, 197 U. S. 207, 222;
Lilienthal's Tobacco v. *United States*, 97 U. S. 237, 266; 24 L. Ed. 901;
Underhill's Criminal Evidence, (2nd ed.), Sec. 23;
3 Blashfield's Instructions to Juries (2nd ed.), Sec. 5675, p. 3599, #14.

A case precisely analogous to the present, so far as the principle respecting presumptions is concerned, is

State v. *Shelley*, 166 Mo. 616.

The offense involved there was the false personation of an elector and voting thereby. On the trial the election rolls had been introduced in evidence, but no proof made of the actual existence of the elector impersonated; the Court holding that the presumption of regularity attendant upon the keeping of such rolls relieved the necessity of proof. The Supreme Court of the State reversed the conviction on account of this ruling, saying (R. 618):

"The instruction under review evidently rests its taproot upon the idea that inasmuch as it will be presumed that the registration officer, in registering the name of Joseph Connelly as an elector, did his duty in the premises, from thence the pre-

sumption arises that Joseph Connelly was an elector; but such a presumption cannot overlook or overcome the presumption of innocence, which in every case is to be regarded as a matter of evidence, to the benefit of which the party is entitled."

The question frequently arises in prosecutions for seduction. Perhaps no more sacred presumption is known to the law than that of chastity of womanhood. Time and again convictions have been had where the presumption of chastity was indulged to dispense with proof. But when such cases have reached an appellate court the convictions have been reversed. Such a case was *West* v. *State*, 1 Wis. 209, where the Court said:

> "But these excellent and humane presumptions of law, so pregnant with the testimony which it bears to the dignity and honor of human nature, are always to be used in the administration of justice as a weapon of defense, not of assault. They are the shield of the accused, not the sword of the prosecutor.
>
> "The State cannot be permitted to presume the immediate pre-existence of that chastity, with the destruction of which the defendant is charged.
>
> "The presumption of innocence which the law affords the defendant must be as broad as the offense charged, and it would seem that the scope and strength of that presumption should not be lessened or impaired by counter-presumptions."

See, also:

> *Lucas* v. *United States*, 163 U. S. 612;
> *Underhill's Criminal Evidence* (2nd ed.), *Sec.* 19, *p.* 35;

State v. *McDaniel*, 84 N. C. 803;
Commonwealth v. *Whitaker*, 131 Mass. 234;
People v. *O'Brien*, 130 Cal. 1.;
People v. *Roderigas*, 49 Cal. 11;
People v. *Krusick*, 93 Cal. 79;
Lawson on Presumptive Evidence (2nd ed.), *pp.* 525, 526;
2 Chamberlayne, The Modern Law of Evidence, Sec. 1228, *pp.* 1557, 1558.

Point VI.

The Court Erred in Overruling the Motion of the Defendant Below to Direct the Jury to Return a Verdict of Not Guilty, Because There Was no Proof That the Questions Propounded Were Questions of the Committee.

Assignment of error 6 in the Court below (R. 57) will be considered under this Point.

The next essential ingredient of the offense which it is contended was not proven is, that the questions were propounded *by the Committee.*

As has been previously shown, there is no authority in an individual Senator to require testimony; the power initially is in the Senate. That body may delegate its authority to inquire to a Committee. If it has regularly done so, the Committee may require an answer to a question; but it is submitted that until and unless the Committee (and maybe only the Senate itself, since it alone possesses the constitutional power)—as distinguished from any single member thereof—has demanded an answer to the question, no offense can be committed by a refusal to answer a question propounded by an individual Senator.

Here there is no proof whatever that the questions set out in the indictment were the questions of the

Committee, except that *Senator Walsh asked* three of the questions *and Senator Adams asked* the other, which the defendant declined to answer. No attempt was made to prove that the Committee had adopted the questions. Indeed, it is clear from the record of the proceedings in evidence that the Committee did not adopt the questions.

It is the usual practice with the Senate (and House as well) that when a witness under examination before a Committee has propounded to him a question by one member of the Committee, which he declines to answer, to follow one or the other of the two following courses: Either for the Committee itself to vote upon the question of whether he shall be required to answer, and, if the vote be in the affirmative, to resubmit it to him, or for the Committee to make a report to the House, the witness to be summoned before the full House, and by vote of the House ordered to answer the inquiry.

> ***Jefferson's Manual, sec.* 13;**
> ***3 Hinds' Precedents of the House of Representatives, p.* 120.**

Cases where the House debated whether witnesses should answer, are many. See the following in *3 Hinds' Precedents of House of Representatives*: E. W. Barnes, *sec.* 1695; J. Madison Wells, *sec.* 1698; J. B. Seward, *sec.* 1689; Richard B. Irvin, *sec.* 1690; George F. Seward, *sec.* 1699. The remarks of the Speaker (in 1868) on this point are interesting (*3 Hinds' Precedents, sec.* 1685, *p.* 27).

In *Woolley's Case, sec.* 1685, *p.* 26, the Speaker said:

> "The chair overrules the point of order on the ground that the uniform usage of the House from the Twelfth Congress down to the present time has been that where a witness is before a Com-

> mittee of the House that is authorized to send for persons and papers, and refuses to testify, he is first to have an opportunity to explain to the House of Representatives why he refuses to testify. He cannot be held to answer until the Committee shall present the question to the House and the House shall, at its bar, through the Speaker, present to him the question, and ascertain why he has refused to answer it."

The bare statement of the proposition makes it obvious. Assume an individual Senator propounded a question which the witness thought improper; that the Senator appealed to the Committee to adopt his question. May it not well be that upon the witness finding the whole Committee, or a majority thereof, considered the question was proper, he would then decide to answer it, and do so? Would he be guilty of a crime for his first refusal? Or, assume again the same situation, and the Committee or the House declined to support the Senator's demand, would the witness none the less have committed a crime by his refusal to answer the individual Senator's question; notwithstanding the Committee or the Senate itself refused to adopt the question?

The decision in *McGrain* v. *Daugherty* was rested by this Court, in large measure, upon the settled practice of the Houses of Congress. (273 U. S. 173, 174).

Is not then the settled practice with respect to interrogatories persuasive of the meaning of the statute if there is any doubt about it?

No better illustration of the practice of the Senate itself in respect to this point could be had than what actually transpired in connection with the interrogation of Mr. Sinclair while a witness at a session of the Committee prior to the passage of S. J. R. 54, when he appeared and had submitted to a very comprehensive

examination, but was reluctant to answer one question in particular because of its obvious impertinency and unnecessary intrusion into private affairs of other persons, as is shown from the excerpts of the Committee's minutes set forth in the Congressional Record (*Ibid., pp.* 1689, 1690).

Mr. Sinclair had given some testimony respecting a certain syndicate, and Senator Walsh demanded of him the names of the members of that syndicate. Mr. Sinclair then said:

> "I have the names of the members of that syndicate here. If the Committee insists upon my giving them to the Committee, I will do so. I think it is a private matter and do not think it is pertinent to this inquiry. I do not care to divulge the private business of other people, citizens of the United States, and corporation in which I am not interested * * *.
>
> "Senator Walsh of Montana: I submit the matter to the Committee, Mr. Chairman."

Mr. Sinclair thereupon offered to furnish the information to the Committee or any member in executive session, but indicated that he did not think it ought to be made a matter of public record. With this offer Senator Walsh was not satisfied.

> "The Chairman: You may state, Senator Walsh, what bearing this has according to your judgment."

Senator Walsh indicated that he was unwilling to disclose the purpose. Then followed some discussion, another Senator expressing his inability to see the pertinency. And after the discussion:

"The Chairman: It wholly *rests with the Committee* as to the course that shall be taken.

"Senator Walsh: I ask that the Committee direct the witness to answer."

The Chairman thereupon put the question to a vote. Upon a roll-call, the affirmative prevailed; and Mr. Sinclair then answered.

In the indictment in this case the pleader clearly considered that the question contemplated by the statute was a question of the Committee, not of the individual Senator; for he avers

> "That thereupon the Hon. Thomas J. Walsh, a member of said Committee, *for said Committee*, propounded to said Harry F. Sinclair a certain question," etc. (R. 12),

but no proof was made that the question was propounded "for said Committee".

This precise question arose in *United States* v. *John E. Searles*, one of the companion cases of the *Chapman Case, supra* (which was tried in the Supreme Court of the District after the *Chapman Case)*, and a verdict of acquittal instructed by the Court. The case is reported in Washington Law Reporter, Volume 25, p. 384 *(not otherwise)*; and dealing with this point the learned Justice said:

> "The questions were put by Senator Allen, not by the Chairman of the Committee. Senator Allen, in common with other members of the Committee, as it appears by the evidence, had the power to make proper inquiries of the witness who was under examination. That right cannot be questioned. If a witness before the Committee refused on the ground of privilege, or on any other ground

that was deemed sufficient by him, to answer a question put by any member of the Committee, *were advised by the Committee that the question was put by its authority, and that it insisted upon an answer*, his contumacy upon refusing to answer after such advice would be complete. In the case of the defendant, however, it appears that he was not advised that the answer was insisted upon by anyone. After his refusal to answer the questions that were put, his examination proceeded at great length. He was examined before the Committee on the 13th of June, 1894. His contumacy was reported to the Senate by the Committee on the 21st day of June, 1894, after his examination had been completed, *and he had been discharged as a witness.*"

It will be recalled that the defendant here was likewise excused as a witness immediately following the last question. (R. 128.)

A moment's reflection concerning the analogy of the situation here, to like situations in a court of law, will show that the offense is not committed until a refusal to answer after the question has been passed upon by the Court—*the authority* to require an answer.

An attorney for a litigant asks a witness a question, and the witness declines to answer because he thinks it an unnecessary intrusion into his private affairs; or he thinks and says that he believes the counsel is fishing for evidence to be used in another proceeding. Is he in contempt then? Not at all. The questioner calls upon the Court to require the witness to answer, and the Court determines whether it is pertinent, and, if so, orders an answer.

It is only a persisting refusal that will constitute contempt. Likewise, the same situation with respect to a

grand jury. A witness before it declines to answer a question either of the District Attorney or some member of the jury. He is brought before the Court, and only if he persists in declining to answer, after the Court has directed he shall, is he guilty of contempt.

Point VII.

The Court Erred in Overruling the Motion of the Defendant Below to Direct the Jury to Return a Verdict of Not Guilty, Because There Was no Proof That the Questions Propounded to the Witness Were Pertinent to Any Inquiry Which the Committee Was Authorized to Conduct.

Under this Point, assignments of error 7, 8, 9 (R. 58), and assignment of error 40 (R. 59) in the Court below will be considered. These assignments of error embrace the error of the Court in denying defendant's requested instructions Nos. 16, 17 (R. 160), 18, 19, 20 (R. 161), 25 (R. 163).

The next essential ingredient of the offense as to which it is claimed the proof completely failed, is the allegation that the questions were *pertinent* to an authorized inquiry. Under Point I hereof it is contended that even with the aid of the innuendoes alleged following each question in the indictment, no indication of pertinency to any legislative inquiry respecting the Naval Reserves could be discerned. But under this point we find that the questions are stripped even of those innuendoes and stand nakedly alone; for not a shred of evidence was introduced to establish the innuendoes. The questions are set out in full at pages 6-7 *ante* hereof.

With respect to the first count, the Government offered in Evidence Exhibits 17 and 18 (R. 90), the con-

tracts referred to by the innuendo, and Senator Walsh testified that the contracts in question had been before the Committee (R. 91), but nothing further in relation to it; nothing about any "facts * * * touching the execution and delivery" of the contracts which the innuendo alleges were meant to be elicited by the question. The plain reasonable inference from the situation is that there were no such known facts, but that the Senator was conducting

> "a fishing expedition * * * upon the chance that something disagreeable might turn up." (Mr. Justice HOLMES, in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434, 444);

and manifestly, a fishing expedition for evidence to aid in the prosecution of the civil and criminal proceedings then pending and about to be instituted in the courts.

As to the fourth count, the question and the innuendo concerning the testimony of John C. Shaffer, the innuendo of which is that the intention was to elicit from the witness "facts * * * touching the making of a certain oral agreement," etc. There was no proof whatever offered by the Government to support this innuendo. The defendant, however, did show (R. 129) that in the bill in equity, filed by the Government in the District Court of Wyoming prior to his appearance before the Committee on March 22, 1924, it is alleged in Paragraph 26 thereof that the agreement recited in the innuendo had been entered into.

Here the motive of the question is unescapable; an examination before trial in aid of the litigation; not in aid of legislation.

No proof other than the bare question and the refusal to answer was offered in support of the pertinency of the question involved in the fifth count, that is, where and

when the witness had met Secretary Fall "in November and December last."

It is impossible to imagine any legislative purpose that could be effected or aided by an answer to this inquiry. There is no difficulty at all, however, in discerning a very real motive, when it is borne in mind that

> "The Committee is acting as a grand jury and should go on and indict—find all the facts and report them to the Senate in the indictment" (*Congressional Record, ibid., p.* 1391),

a new name indeed in this day and age for a legislative bill.

As to the ninth count: Here again no proof whatever was offered in support of the innuendo, or otherwise to support the averment of pertinency; and likewise no conceivable relation of the question to any possible legislation can be conjectured. But it takes no imagination at all to find a direct relation of the question to the grand jury inquiry about to be instituted and to the charges contained in Paragraph 28 of the bill in equity theretofore filed by the Government (R. 129) seeking to cancel the leases.

This Court may be curious as to how the trial Court could have supposed these four questions (R. 13, 16, 17, 21) to be pertinent to any legislative inquiry. The answer is, it did not. The trial Court simply accepted the view urged upon it by the prosecution that the overruling of the demurrer to the indictment established the law of the case as to pertinency, and that the question of pertinency was not open for consideration by it. We think in that regard the Court erred, if for no other reason, because it is conceivable that the learned Justice who passed upon the demurrer may have considered that the questions were aided in some measure by the innu-

endoes. Consequently, the position confronting the trial Court at the close of the evidence was entirely different from that subsisting on demurrer. By the failure to make any proof of the innuendoes, the averment of pertinency then remained unsupported by anything but the naked questions; just as though the innuendoes had been stricken from the indictment.

In the *Searles Case*, 25 Washington Law Reporter, 384, *(otherwise unreported)*, Mr. Justice BRADLEY, in directing a verdict of acquittal for failure of proof of pertinency dealing with questions as to which the prosecution was at least able to suggest a conjectural relevancy, said (p. 390):

> "There is nothing in the evidence that tends to show that these questions put were pertinent to the subject matter of the inquiry that the committee was making. [Here the inquiry itself was concededly an authorized one.] It would seem, that, this being of the very essence of the charge upon which this criminal prosecution is based, the pertinency of the question should be made to appear affirmatively, and that the matter of its pertinency should not be dependent upon mere conjecture or speculation. Where on writ of error it appears that the right to put a particular question has been denied, it is held that it must affirmatively appear that the question was material to the issue that was being tried. In the case of Philadelphia & Trenton R. R. *vs.* Stimson, 14 Pet. 448, it is said by the Court: 'It is incumbent upon those who insist upon the right to put particular questions to a witness to establish that right beyond any reasonable doubt for the very purpose stated by them.'

"If that be so, where a case is being heard in an appellate court upon a writ of error, **it must necessarily be so in a criminal prosecution, where the question of the contumacy of the defendant is absolutely dependent upon the question of the pertinency of the inquiry that was put to him, which he refused to answer, and the charge in all of its elements must be established by the evidence beyond a reasonable doubt.**"

* * * * * * * *

Again the Court said (p. 390):

"* * * when he is brought into a court of justice to respond to a criminal charge for refusing to answer a question **that upon its face is apparently immaterial and impertinent, it should appear affirmatively**, that other evidence was at hand, and could be produced, that was necessary to make the connection between the evidentiary fact and the ultimate fact, or, at least, that such evidence subsequently was obtained and produced."

The Court further held, (p. 391):

"Under such circumstances, the pertinency of the questions to the subject-matter of the investigation, or, to use the language of Section 102, 'to the question under inquiry,' being absolutely and entirely wanting, it must be held that the defendant was under no obligation to answer them: * * *"

In the *Shriver Case*, reported in Washington Law Reporter, Vol. 25, p. 414, *(otherwise unreported)*, in which Mr. Justice BRADLEY likewise delivered an opinion directing the jury to return a verdict of not guilty under an indictment brought under the same statute as the one presented here, he held that the word "pertinent" was synonymous with "relevant" and declared, (p. 416):

> "'A fact is said to be relevant when it is so connected, directly or indirectly, with a fact in issue in an action or other proceeding, that evidence given respecting it may reasonably be expected to assist in proving or disproving the fact in issue.' 20 Am. & Eng. Encyc. L. 786."

Mr. Justice BRADLEY further said, (p. 416):

> "It was evidently the purpose of the Congress in the statute in question to limit the responsibility of witnesses summoned to testify in an investigation of charges, to answering such questions only as would elicit facts that would tend to prove or disprove the charges. If a Congressional committee sees fit to roam in the realm of collateral, irrelevant, immaterial, impertinent matters, the witness who refuses to accompany it will not be amenable to the penalties of this statute."

Questions like those here involved, obviously in search of evidence to support litigation in the courts, are not pertinent questions within the meaning of the statute.

While, as previously pointed out, no presumption can be indulged to override the presumption of innocence and to dispense with proof of an essential ingredient of the crime, did not these inhibitions exist, still there would be no authority to *presume* the pertinency of the questions here involved, for the simple reason that it would violate the very fundamentals of the law of presumptions. Presumptions, when permissible, subsist only until some evidence appears tending to negative them; then the presumption disappears, the burden still remains on the prosecution, and *proof* must be supplied. Immediately *any* evidence appears to undermine the presumption, it disappears, and proof must be produced.

5 Wigmore on Evidence (2nd ed.), Secs. 2490, 2491, 2493, *pp.* 448-454.

Here conflicting evidence is presented on the Government's own case. The presumption would rest on the supposition that the Senators would stay within the law; would ask only such questions as they were lawfully entitled to; as were pertinent. But what is the fact? The ruling on demurrer holding three of the questions unauthorized, because not pertinent, establishes precisely the contrary of the presumption; establishes the fact that it is not true that the Senators were staying within the law and were asking only pertinent questions. So, the presumption would disappear and the burden of proof would rest on the Government to establish by affirmative proof, *by facts*, that the questions were pertinent.

If we assume that a fact is pertinent only when it is so connected, directly or indirectly, with a fact in issue, that evidence given respecting it may reasonably be expected to assist in proving or disproving the fact in issue, then the question of pertinency is a question of fact, to be determined by logical reasoning and not by legal rules. Whether the facts called for by a question are so connected with other facts as to be of assistance in reaching a final conclusion is not a question of law. It is true that in a regular judicial proceeding the Court determines the pertinency or relevancy of evidence offered, that is whether it should be allowed to be considered by a jury; but when the question of its pertinency is the essential ingredient of the crime charged, we maintain that the question is one which must be submitted to a jury, along with all of the other facts in the case, to the end that the accused may be afforded a trial by jury under the Sixth Amendment of the essential ingredients of the crime charged.

In peremptorily withdrawing from the consideration of the jury the question of pertinency of the questions propounded to Mr. Sinclair, as is shown in the charge of the Court quoted under Point 8 of this brief (*post*, p. 108-9), the Court obviously misconstrued the meaning of the language employed by Chief Justice ALVEY in the case of *Chapman* v. *U. S.*, 5 App. D. C., 122, where he said (p. 137), "Whether the questions propounded by the Committee or by the Senate were pertinent is a *judicial question*, and is an essential element of the offense charged." We think the trial Court took this to mean that it was a question of law, for the Court to determine. A "judicial question" means a question to be adjudicated in a court of justice, and that is all it does mean. It does not mean that it is a question of law to be decided by the Court any more than it means a question of fact to be decided by the jury or a mixed question of fact and law which the Court must, under proper instructions, submit to the jury for determination; and, when Chief Justice ALVEY used that language in the *Chapman Case*, *supra*, he meant to say this and only this:—that it was a judicial question to be determined in a court of justice, as distinguished from a legislative question to be determined by the legislative body.

In *Thayer's Preliminary Treatise on Evidence*, Part II, pp. 264-265, it is said:

> "Observe at this point, one or two fundamental conceptions. There is a principle—not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence, as contrasted with the old formal and mechanical systems—which forbids receiving anything irrelevant, not logically probative. How are we to know what these forbidden things are? Not by any rule of law. The law furnished no test

> of relevancy. For this, it tacitly refers to logic and general experience,—assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them."

See also, *Jones' Commentaries on Evidence* (2nd ed.), p. 1086, et seq.

The court, in withdrawing from the jury the question of pertinency, withdrew from their consideration that which Chief Justice ALVEY determined was "an essential element of the offense charged," and required the jury to answer specific questions in the nature of a special verdict, which thereby in effect denied the defendant the right of trial by jury.

Point VIII.

The Court Erred in Holding That the Question of Pertinency of the Questions Was One of Law for the Court, and not a Mixed Question of Law and Fact or a Question of Fact To Be Decided by the Jury, and Thereby Refused to Submit to the Jury all of the Essential Ingredients of the Crime Charged, Which Refusal Amounted to a Denial of the Right to Trial by Jury.

Under this branch of the argument we will, for the purpose of brevity, group Specifications of Error 8, 9, 10 and 11 in this Court. (R. 195.)

Under this Point will be considered assignments of error in the Court below numbered 9, (R. 57); 10, (R. 58); 17, 21 to 27 inclusive, (R. 58); 31 to 42 inclusive, (R. 59), relating to the refusal of the Court to submit to the jury matters held by the Court to be matters of law for its decision; and instructions given and refused in this respect.

As has been indicated hereinbefore, the Court held that

(*a*) Whether the defendant was summoned regularly or legally;

(*b*) Whether he was legally under oath March 22, 1924;

(*c*) Whether the questions propounded to him were questions of the Committee;

(*d*) Whether the questions were pertinent; and

(*e*) Whether the inquiry pending March 22, 1924, was an authorized inquiry, as that phrase is defined in the preceding argument, were all questions of law to be determined by the Court, and were not even submitted to the jury with the Court's instructions concerning its findings in that regard. In other words, these essential ingredients of the crime were not submitted to the jury for its determination with the instructions of the Court concerning the legal effect of the facts proved, but instead the jury was expressly confined by the instructions to these issues of facts, namely, whether the defendant

> "was summoned as a matter of fact, whether he appeared as a matter of fact, in Washington; whether he was sworn as a matter of fact, whether he was asked these questions and refused to answer them you are concerned only with the matters of fact that are involved in those questions. Did he in New York get the command of the Senate committee to appear here as a matter of fact? Did he appear here? When he appeared did one of the Senators—I have forgotten which one—or some officers of that committee, administer to him an oath? And did he then and there proceed to give certain testimony, and later when he was recalled again refuse to give certain testimony?

> "Whether the officer who served him in New York had legal authority to serve him, whether the official who swore him, if you find from the evidence that he was served by an officer and that he was sworn by an official, whether the officer in New York or the Senator in Washington had legal authority to serve him and to administer the oath to him, are not questions which you are called upon to decide. They are troubles which must be decided elsewhere." (R. 170.)

Thus, the jury were given these four special issues of fact and authorized and instructed, if they found them affirmatively, to render a general verdict of guilty. Certainly this is not trial by jury, such as the Sixth Amendment requires. The Court of Appeals of the District of Columbia, has said in the *Egan Case* (52 app. D. C., 384) and this Court has said in the *Agnew Case* (165 U. S. 36), and it has been said over and over again, that every essential ingredient of the crime must be proven to the satisfaction of the jury beyond a reasonable doubt.

Conceding, for the moment, that a situation may exist where an essential ingredient of an offense involves a question of law for determination by the Court, there being no conflict of evidence or other ambiguity attendant upon the facts which are the basis upon which such legal conclusion is predicated, still the Court cannot legally withdraw from the jury the determination of the ultimate fact upon which rests the question of the guilt or innocence of the accused. In such case the Court should instruct the jury that if they believe the facts, the predicate of their conclusion, the legal effect of them is to establish the essential ingredient to which they relate. This the Court not only did not do, but, when the jury returned for further instructions on the question of reasonable doubt, the Court, over the objection of the defendant, volunteered a reiteration of its charge concerning the

limitations he had imposed upon the deliberations of the jury (R. 176, 177):

> "In the courts of the United States it is the duty of the jury, in criminal cases, to receive the law from the court, and to apply it as given by the court, subject to the condition that by a general verdict a jury of necessity determines both law and fact as compounded in the issue submitted to them in the particular case."
>
> *Sparf & Hansen* v. *United States*, 156 U. S. 51.

An illustration of what should be done in such circumstances is given in *3 Blashfield's Instructions to Juries* (2nd ed.), *Sec.* 5675, in the case of perjury, where there is involved the legal conclusion of materiality; *2 Brickwood Sackett's Instructions, Secs.* 3256-3267, relating to perjury.

See, also:

> *People* v. *Clemenshaw*, 59 Cal. 385;
> *3 Thompson on Trials* (2nd ed.), Sec. 5397, p. 3220;
> *1 Cooley's Constitutional Limitations* (8th ed.), p. 678.

But, in the instant case, the error is all the more obvious because some of the matters involved are clearly questions of fact; as to others, there is no evidence upon which to base the legal conclusion, and as to substantially all the others, they are at least mixed questions of fact and law.

It is manifest in such situations that the Court cannot take to itself the decision of such questions of fact or mixed questions of law and fact, and entirely withdraw

from the jury the decision of questions of fact necessarily involved. For example, respecting the purported summons, in the first place there is no proof of summons at all previous to the administration of the oath. As has been previously pointed out, there was a clearly defective summons issued March 19, 1924 (four months after the oath relied upon). If it is to be assumed that the purported summons of March 19, 1924, is the summons contemplated by the statute, it is at least a question of fact as to whether or not the Sergeant at Arms intended to or did deputize the United States Marshal. It might be inferred from the instructions that it was the view of the trial Court that a regular legal summons was unnecessary, that any kind of a summons, even a telegram from the Chairman of the Committee, would be sufficient to bring the accused within the condemnation of the statute upon which the indictment is founded, and, further, that a summons was not a pre-requisite to the administration of an oath.

Mr. Justice BRADLEY, in instructing a verdict for the defendant in the *Shriver Case*, 25 Washington Law Reporter, p. 414, held that a regular summons, precedent to the oath, was a requisite to compliance with the statute; an essential ingredient.

As has been seen before, there is no pretense that any summons of any kind had been issued before the oath of December 4, 1923. Again, whether the oath of December 4, 1923, had any force, is dependent upon the question of fact whether an authorized proceeding was then pending; and although whether the proceeding was an authorized one, involves a legal conclusion, it is itself in turn dependent upon the facts respecting the status and meaning of the resolutions.

Whether the questions were those of the Committee or of the individual Senators, is certainly a question of fact; and there is not a shred of evidence to indicate that they were the questions of the Committee. On the con-

trary, the evidence inevitably leads to the inference that the questions were not passed upon or adopted or in any other manner made those of the Committee. The only theory conceivable upon which it might be supposed a legal conclusion would be involved, would be by indulging the presumption that questions asked by Committeemen were questions of the Committee itself. As has been seen previously, no presumption can be indulged to override the presumption of innocence.

The pertinency of the questions necessarily involved questions of fact. First assuming they were all clear and unambiguous, it would be a question of fact, and fact alone, as to which branch of the resolution they were pertinent to, *i. e.*, the judicial inquiry directed by the resolution, clearly without the jurisdiction of the Senate, or the legislative aspect within its competence. But three of the questions are plainly open to at least two, and possibly more, constructions. This may be illustrated best by taking the question in the ninth count (R. 21):

> "Senator Adams: Mr. Sinclair, I believe in an earlier hearing you testified, in answer to a question, that you had in no way, and none of your companies had in any way, given or loaned anything to Secretary Fall. Is that correct?"

Applying strict rules of grammatical construction, this question can have but one meaning, and that is, is the Senator's belief correct; is his recollection concerning the previous testimony correct? The word "that" in the phrase "Is that correct?" refers back to the word "believe". Now, if that is the true meaning of the question, it is obviously not pertinent within the proper interpretation of the term "pertinent." Whether the Senator's belief concerning previous testimony was correct or not, could not have the slightest influence in aiding the

Senate effectually to legislate. If, however, the Court thought the other meaning was more probable, that is, to inquire whether anything had been given or loaned to Secretary Fall, and believed that a question such as that would be pertinent (although no pertinency is apparent), the most the Court could do in such circumstances would be to instruct the jury that they were to determine the meaning of the question as between those two meanings; and if they found the latter was the real meaning, then as matter of law he instructed them, it would be pertinent, and further, that if the defendant knew such was the meaning, then the jury could find him guilty; but if the jury believed the former meaning was the true meaning, or had any reasonable doubt concerning what the meaning was, then they must acquit.

The defendant requested the Court to instruct the jury as follows:

> "The jury are instructed that the question propounded as set forth in the ninth count of the indictment was as follows:
>
> "'Senator Adams: Mr. Sinclair, I believe in an earlier hearing you testified, in answer to a question, that you had in no way, and none of your companies had in any way, given or loaned anything to Secretary Fall. Is that correct?'
>
> and that in considering this, the ninth, count of the indictment the jury are instructed that, if they believe that this question was merely intended to elicit from the witness the fact as to whether he had testified in a certain manner and to a certain fact or facts at a previous hearing of the committee, then the question was not pertinent to the matter under inquiry, and the jury must find a verdict of not guilty as to this, the ninth, count of the indictment." (R. 166.)

This question, as propounded by Senator Adams, was clearly open to two interpretations. One was that it was merely intended to elicit from the witness the fact as to whether he had testified in a certain manner and to certain facts at a previous hearing of the Committee. In that view of the question it certainly could not be said that it was pertinent to any investigation which the Committee was authorized to conduct in aid of its legislative functions. The meaning of this question necessarily involved the determination of a question of fact, and it was error for the Court to deny the requested instruction.

The same double meaning is present in the so-called question set out in the fourth count of the indictment (R. 16), and even more pronouncedly so in the so-called question set out in the first count of the indictment (R. 13)—if it really can be construed to be a question at all.

The defendant requested the Court to submit to the jury the following instruction, respecting the fourth count in the indictment:

> "The jury are instructed that the question propounded as set forth in the fourth count of the indictment was as follows:
>
> "'Senator Walsh of Montana: Since you were on the stand last Mr. John C. Shaffer told us about an agreement between yourself and Secretary Fall, under which Mr. Shaffer was to receive from you a certain portion of the territory covered by the lease which you secured for the Mammoth Oil Co. Will you tell us about that matter?'
>
> and that, in considering this, the fourth, count of the indictment, the jury are instructed that if they find that this question was in fact intended to elicit information from the witness as to his knowledge of the testimony which had theretofore been

given by John C. Shaffer at hearings before said committee, then the question was not pertinent to the matter under inquiry and the jury must find a verdict of not guilty as to this, the fourth, count of the indictment." (R. 165.)

This question was clearly open, as a matter of fact, to two interpretations. Conceivably it may have called upon the witness to tell the Committee about an agreement between him and John C. Shaffer and Secretary Fall, under which Mr. Shaffer was to receive from the witness a certain portion of the territory covered by the lease secured by the Mammoth Oil Company. On the other hand, conceivably even more directly, the question called upon the witness to tell the Committee what he knew concerning the testimony which John C. Shaffer had given to the Committee respecting an agreement between the witness, Shaffer and Secretary Fall. The determination as to which of these was the true interpretation of the question was a pure determination of fact, and the Court erred in refusing to submit that question to the jury as requested by the defendant.

The defendant requested the Court to give to the jury the following instruction:

"The jury are instructed that the question propounded as set forth in the first count of the indictment was as follows:

"'Senator Walsh: Mr. Sinclair, I desire to interrogate you about a matter concerning which the committee had no knowledge or reliable information at any time when you had heretofore appeared before the committee and with respect to which you must then have had knowledge. I refer to the testimony given by Mr. Bonfils concerning a contract that you made with him touching

> the Teapot Dome. I wish you would tell us about that.' And that in considering this, the first, count of the indictment the jury are instructed that if they find that said question called upon the witness to tell the committee about the testimony given by Mr. Bonfils at a previous hearing before the committee, then the question was not pertinent to the matter under inquiry and the jury must find a verdict of not guilty on this, the first, count of the indictment." (R. 164-65.)

This question, if in fact it may be treated as a question, contained first a declaration of Senator Walsh and is clearly open to two constructions, though the one which would seem most apparent was that he was asking the witness to give testimony as to statements made by Bonfils before the Committee at a previous hearing. It was clearly a question of fact as to what interpretation should be put upon this question. The defendant requested the Court to submit it to the jury as a question of fact, and the Court erred in refusing so to do.

The fifth count in the indictment on which the jury found the defendant guilty under the instructions of the Court contained the following question:

> "Senator Walsh of Montana: Mr. Sinclair, will you tell the Committee where and when you met Secretary Fall during the months of November and December last." (R. 17.)

It is conceded that Albert B. Fall ceased to be Secretary of the Interior on March 4, 1923 (R. 156) and that during the months of November and December, 1923, he was not Secretary of the Interior.

The defendant requested the Court to give the jury the following instruction:

"If the jury find that Albert B. Fall ceased to be Secretary of the Interior on March 4, 1923, and that during the months of November and December, 1923, he was not Secretary of the Interior, then they are instructed that the question propounded to the defendant, as set out in the fifth count of the indictment, was not pertinent to any inquiry that the Committee on Public Lands and Surveys of the Senate was authorized to conduct, and their verdict should be not guilty on the fifth count." (R. 167.)

It is inconceivable that this question was intended to or could have had the effect of eliciting any information which could be used in aid of the discharge of a legislative function; and it was error for the Court to deny the requested instruction.

Situations, similar in character to the one presented here, arise with great frequency in the trial of causes where there are involved such issues as jurisdiction, venue, materiality, criminal libels, etc. In such cases the Court, of course, instructs the jury that it must determine the underlying fact and be guided by the Court's conclusion of its legal effect in either direction. Of course, a general verdict is returned, but there is incorporated in such verdict the application of the Court's instruction concerning the legal effect of facts to the jury's conclusion concerning the facts themselves.

16 Corpus Juris, 923, Secs. 2275, *et seq.*:
United States **v.** ***Jackalow***, 1 Black. 227;
Rex **v.** ***Karn***, 5 Ontario Law Reporter, 704.

"Questions of jurisdiction ordinarily belong and are decided exclusively by the court as pure matters of law; but here it is necessary that such

facts should be passed upon by the jury before that question can properly arise. Where the jurisdiction, however, depends upon the existence of facts, the jury may, under the direction of the court, as a matter of law, affirm, through the medium of a general verdict, that there is or is not jurisdiction."

United States v. *Saunders*, 27 Fed. Cas. No. 16220, p. 952.

The defendant was not only entitled to have all these matters go to the jury, but he was entitled to have the benefit of any reasonable doubt respecting the questions of fact involved in each of them. The denial of these rights deprived him of a trial by jury.

Point IX.

The Court Erred in Excluding Evidence Offered to Prove That the Witness Rightfully Refused to Answer the Questions.

Under this branch of the argument specification of error No. 12 in this Court (R. 196) will be discussed. Under this Point assignments of error in the Court below numbered 10, 11, (R. 58); 18, 19, 20, 27, (R. 58); 28, 29, 30, (R. 59); 43 and 46, (R. 60); are considered. They relate to the refusal of the Court to receive evidence tendered by the defendant of the fact of his appearance before the Committee previous to the passage of Senate Joint Resolution 54 and five times freely submitting to extended and comprehensive examination upon the subject which the Committee was investigating; the evidence of his counsel that the refusal was in the utmost good faith, based on competent advice to the witness that

he might *rightfully refuse* in all the circumstances; and the refusal of the Court to grant instructions requested, submitting to the jury the determination of whether there was such degree of wilfulness in the refusal as would be inherent in the nature of the offense under settled principles of constitutional law.

The point here intended to be made was entirely misconceived in the court below, through confusion of it by the trial court and the prosecution with the technical "wilful" usually contained in statutes making offenses.

We are not here contending that in the case of a *malum prohibitum* statute, containing a qualification of wilful, it is insufficient for the Government simply to prove the facts constituting the offense and rely on the general doctrine that one is assumed to intend the consequences of his acts. The point here goes much beyond that question. It is, in substance, that the decision in *McGrain* v. *Daugherty*, 273 U. S. 135, has in effect spelled into Section 102 R. S. the element of wilfulness or, at the very least, of *scienter;* and we say it must now be given that construction to avoid running afoul of the Fifth and Sixth Amendments. There is of course no insuperable obstacle to doing this.

Elementary rules of statutory construction permit, in proper circumstances, the addition, elimination or qualification of words in statutes when such is necessary, in order to avoid declaring the statute invalid, and yet at the same time preserve the legislative design. Such is precisely what was done in the *Chapman Case*, as shown in Point I of this brief *(p. 25, ante)*. In that case it was claimed that the word "any" before "question" rendered the statute invalid, since the effect of it was to make an offense of the refusal to answer a question, quite without the jurisdictional power of the Senate to require. The Court held that the statute should be given

"a sensible construction, such as will effectuate the legislative intention, and if possible so as to avoid an unjust or absurd conclusion."

In re Chapman, 166 U. S. 661.

What then, it should be inquired, is the legislative intention here, and we find the answer is to prevent the withholding from Congress of information necessary to enable it effectively to discharge its function of legislation. That is the gravamen of the offense.

We have next to notice some fundamental requisites of the Fifth and Sixth Amendments which need to be observed in statutes which attempt to create offenses. They are that the statute itself, in its definition of the offense, must not be so vague and uncertain in its terms, lacking in definable standards, as to make it impossible for the citizen to know that in doing an act (entirely free of moral turpitude) he is committing a crime or has committed one, until by some subsequent event or by virtue of some extraneous circumstance unknown to him the act becomes a crime (*United States* v. *Fox*, 95 U. S. 670). That is, he may not know what has been forbidden until a court or jury, to which Congress has in effect attempted to delegate the function of legislation, has determined what act should be held to be criminal.

An illustration is the Lever Act, so-called, passed during the War to prevent hoarding, which in Section 2 attempted to make it an offense for one "to exact excessive prices for any necessaries." In declaring that statute unconstitutional because of its failure to afford any ascertainable standard of guilt, in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, Chief Justice WHITE said (*pp.* 89, 90):

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question,

that is, whether the words 'That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. *It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.* In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed." (Italics ours.)

Applying these principles to the state of the statute here in question in the light of *McGrain* v. *Daugherty*,

supra, what do we find to be the situation? So long as the Senate might be proceeding upon an inquiry within its quasi-judicial functions, the question is free of difficulty, for the reason that there are charges, in a sense issues—true, perhaps, not as clearly defined as issues in a court of law—but at least something of substance with reference to which pertinency might be judged. But when we get in the field of an inquiry in aid of legislation, we find an entirely different situation. All we have is the bare subject-matter alone; perhaps not even any settled tendency, trend or direction of the proposed legislation. There may be vast differences of opinion as to the nature of legislation that should be enacted, which will ultimately be reconciled or settled only long after the inquiry is completed.

There is not only an absence of issues with respect to which relevancy might be determined, but a complete absence—except for the subject-matter—of the very thing with respect to which relevancy is to be determined. It may be that there is in a Senator's mind, entirely unexpressed, an idea, a theory for legislation concerning a subject within the competence of Congress, to which a question might be entirely pertinent and legitimate once such theory was disclosed, without which, however, no relevancy could be conjectured by any one other than the particular Senator.

Again, much evidence may have been taken before the question was asked, and it may have developed facts pointing very reasonably in the direction of legislation concerning the subject-matter, and to those facts or that state of facts the question now asked might be clearly enough pertinent to one conversant with such antecedent testimony; yet, any indication of relevancy would be entirely wanting to one not conversant therewith. Indeed, the pleader of this indictment well recognized the necessity, in order to constitute a crime, that the witness should know and understand the facts supposed to underlie the

innuendo, and he alleges in each count (R. 13, 16, 17, 21) that the Senator meant and intended, as the accused then and there well knew and understood, to elicit from him the said defendant, facts which were then within his knowledge, etc. How could the defendant know what was in the Senator's mind—unexpressed by the question—unless it would be through a knowledge of the extraneous circumstances referred to that would make the meaning of the question evident? (As elsewhere pointed out, there was of course no proof whatever of the innuendoes themselves, to say nothing of knowledge of the defendant, in relation to the subject-matter of them.)

So, it results that if the construction of this statute contended by the prosecution and given it by the trial Court is to prevail, the case may well be that in either of the foregoing illustrations a witness may be interrogated, and, although in complete ignorance of the facts or theories which might make pertinent the question propounded, that is, with no "ascertainable standard of guilt" (255 U. S. 81), to guide or warn him, he becomes guilty of a crime and learns that it was a crime only after he has been indicted, tried and convicted, and the Court, as here, has determined as matter of law that the question was pertinent.

It should be borne in mind that the Government did not even attempt in this case to prove any such extraneous circumstances as might tend to establish pertinency, although of course the affirmative was upon the prosecution.

But the point here under consideration is that whatever inference might have been permissible to be indulged in the way of presumptions from the acts themselves, in favor of the prosecution, under no circumstances should they be so conclusive as to preclude the defendant from rebutting them by showing his good faith in the situation, and permitting a jury to pass upon the question of whether the offense has been committed.

The evidence of Martin W. Littleton (R. 133, 134) offered and excluded (R. 156) on this subject, was as follows:

> "* * * And that if both of those failed to secure what we thought we were entitled to, that is, freedom from examination, and he took the stand, that I would sit alongside of him and would judge as best we could under the circumstances whether the questions that were propounded to him were questions which related solely to the litigation which was already on foot, and to what we called the judicial questions which had been referred to the courts by Senate Joint Resolution 54, or whether those questions were ones which in some way could be related to legislation which was the power conferred upon the Senate Committee for the first time by the Resolution of February 7th. And that if those questions which were asked could be seen to relate to legislation that he would be advised to answer them. But if they related solely and apparently solely to the litigation which had been referred to the courts by an Act of Congress, that I should advise him not to answer them. And we took our seats before the Committee, and these questions which are contained in the indictment were propounded, and as they came over I advised Mr. Sinclair as to each question not to answer each of the questions that were asked, because it was my judgment that they did not relate to anything save the litigation, and I had heard the colloquy also between the Senators in which they had said that they did not wish to ask about anything except that; that they had no other questions except that, and I had heard that, and also judged the questions on their intrinsic

qualities, and I advised him not to answer them on that ground, and on the other grounds which he had read.

"I judged the questions in the light of the resolution, which I had before me, and which I had examined, which undertook or purported to confer certain power and authority upon this committee."

This Court, in the case of *McGrain* v. *Daugherty*, *supra*, said (p. 175):

"The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn* v. *Thompson* and *Re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

Again in the case of *McGrain* v. *Daugherty*, *supra*, the Court said, speaking of the second resolution which directed that the witness be attached and of that portion of

it which declared its purpose to be the obtaining of information necessary as a basis for such legislation and other action as the Senate may deem necessary and proper:

> "The suggested possibility of 'other action' if deemed 'necessary or proper' is of course open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed." (273 U. S. 180.)

From the testimony thus offered and excluded it appears that the defendant Sinclair before declining to answer any of the questions propounded by the Committee sought and obtained advice; that his counsel was present with him before the Committee, having previously considered the resolution under which the Committee was conducting the investigation, and had advised him that he (the counsel) would sit alongside of the witness and would judge as best they could together under the circumstances whether the questions propounded to him were questions which related solely to the litigation which was already on foot or whether those questions were questions which in some way could be related to legislation, and that if those questions which were asked him could be seen to relate to legislation he would be advised to answer them, but if they related solely and apparently solely to litigation which had been referred to the courts by an Act of Congress, that he would advise

him not to answer them. The offered testimony further showed that counsel and the defendant Sinclair took their seats before the Committee and that the questions set forth in the indictment were propounded and that counsel as each question was propounded advised Mr. Sinclair as to each question not to answer because in his judgment they did not relate to anything save the litigation. The testimony which was offered and excluded further showed that counsel had heard the colloquy between the Senators, in which they had said that they did not wish to ask about anything except the litigation; that they had no other questions except those, and that counsel had also judged the questions on their intrinsic qualities and with reference to the resolution under which the Committee was acting.

The question now arises: Under the authority of the case of *McGrain* v. *Daugherty*, *supra*, which announces that "a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry", in what manner may a witness be advised as to whether the questions asked are beyond the bounds of the power of the Committee or are not pertinent to the matter under inquiry? He has been accorded this right fully and explicity by this Court. How is he in safety to assert that right? Must he exercise it without advice and at his peril, and must the jury who are the triers of the ultimate fact of his guilt be denied the evidence that he had endeavored to exercise this right in accordance with the established law?

The right of the witness to refuse to answer where the Committee exceeds the bounds of its power or where the question is not pertinent being clearly established and the witness having no recourse to any tribunal to determine whether the questions are beyond the bounds of the Committee's power or are not pertinent, as may be done

in all other cases where witnesses question the power of the court or administrative bodies conducting the inquiry before giving their answers, is the witness to be denied the means by which he may safeguard this right which this Court has held that he fully enjoys; and if the witness chooses appropriate means to safeguard this right, evincing a desire to stay within the law and answer all legitimate and proper questions and is nevertheless indicted and put upon his trial, may he not show on his trial in his defense on the general question of his guilt of a crime the care and pains which he took to safeguard the right which this Court has said he is clearly entitled to in answer to such a charge?

The court below saw fit to comment upon the advice of counsel and said (R. 171):

> "But he, the defendant, asserted a right there, and he says according to this testimony which is before you that he did it under the advice of counsel."

Undoubtedly the court is here referring to the evidence adduced by the government (R. 86-87) which shows that in reply to each question the defendant Sinclair said that he declined to answer on the advice of counsel and on the grounds already stated. The Court then said (R. 171):

> "Now, it is perfectly possible for a man to follow the advice of learned and competent counsel and land in jail, just as it is possible for a man to follow the advice of learned and competent physicians and land in a cemetery; but that is neither here nor there, so far as your duty and mine is concerned."

Obviously the trial court totally misconceived the important right which this court has accorded to witnesses under examination in investigations being conducted on behalf of either House of Congress.

It appears from the record that the defendant Sinclair had appeared before the Senate Committee on Public Lands and Surveys at different times between October 29, 1923, and March 22, 1924, (R. 123), and that at all of these times he had fully answered all questions propounded to him by the Committee and produced all books and papers called for by the Committee and that at no time had he attempted in any way to obstruct or to frustrate the conduct of the investigation. It further appears that on February 8, 1924, (R. 124-5), and prior to his appearance on March 22, 1924, the President had approved Senate Joint Resolution 54, which directed the institution of civil and criminal proceedings. It further appears that on March 13, 1924 (R. 156), the Government had filed its bill in the Federal District Court of Wyoming, seeking the cancellation of the lease on the ground of illegality and fraud and that an announcement had been made of the summoning of a special grand jury for the purpose of inquiring into alleged criminal conduct of the defendant Sinclair. Therefore, on the date of his appearance on March 22, 1924, the defendant Sinclair was confronted with the question as to whether or not the Committee intended to proceed with the inquiry with respect to the rights and equities of the United States in the Naval Oil Reserves, which had been referred to the courts under Senate Joint Resolution 54, or whether they would proceed with the investigation with a view of ascertaining what, if any, additional legislation might be advisable.

Before he appeared before said Committee, he sought and obtained the advice of counsel who had become familiar with all the facts and circumstances as well as with the resolutions under which the Committee purported to act.

As appears from the colloquy in the Committee, the members were themselves divided in opinion as to what course they should pursue, (R. 122), but on motion it was determined in the presence of the defendant Sinclair and of his counsel that the Committee would proceed with an inquiry into the matters which had been referred to the courts. At this juncture we must remember that the defendant Sinclair rightfully might refuse to answer any question beyond the bounds of the Committee's power or which was not pertinent to any inquiry which the Committee was authorized to conduct.

It was perfectly clear that the Committee was about to propound questions to the defendant Sinclair relating solely to matters which had been referred to the courts and that the witness would be called upon to decide whether it was his duty to answer these questions or not. In making this decision, he acted under the advice of his counsel, who was present and fully aware of the declared purpose of the Committee. This situation clearly gave rise to the question of the good faith of the witness and the decision as to his right to refuse to answer under these circumstances inevitably involves the question of his good faith, and on the question of his good faith we maintain that all of the facts and circumstances, including the advice of his counsel, were relevant and material to determine his guilt of the offenses charged, and it was error for the Court to exclude the proffered testimony.

It has been held that where the honesty of purpose and good faith of the defendant is in issue evidence as to the advice of counsel is proper and should be received and considered. In *Williamson* v. *United States*, 207 U. S. 453, this Court approved a charge of the Trial Court as follows:

> " 'Having now placed before you the timber and stone law and what it denounces, and what it permits, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to applicants under it, and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves willful and unlawful intent; even if such advice were an inaccurate construction of the law. But, on the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.' "

Moreover, it is a settled rule of statutory construction that where it is possible to adopt two meanings, one of which will result in the statute being held constitutional, and the other unconstitutional, it is the duty of the Court construing it to adopt that construction which saves its constitutionality,

> "including the duty of avoiding a construction which raises grave and doubtful constitutional questions if the statute can be reasonably construed so as to avoid such questions."

United States v. *Delaware & Hudson Co.*, 213 U. S. 366.

If, then, that rule be applied to this statute, we find that if it be construed to be limited by implication to only such instances as involve that degree of wilfulness, it would require at least that the witness be advised or have knowledge of the circumstances of fact upon which

relevancy might depend in situations where such relevancy was not apparent upon the face of a question as applied to the subject-matter of the investigation, (as it was in the *Chapman Case*), a construction of the Act is reached consonant with its purpose, an ascertainable standard of guilt exists and a grave doubt concerning its validity avoided.

It is submitted that when in *McGrain* v. *Daugherty*, *supra*, this Court used the words "rightfully refuse" it wrote into this statute the antonym of "rightfully", *i. e.*, "wrongfully" or "wilfully".

Whatever conclusion this Court may reach upon the foregoing contention of the necessity of reading into the statute the word "wilful", in situations such as here present it will at least recognize the necessity of *scienter* to constitute a crime. And although it is the rule in *malum prohibitum* statutes that, a knowledge of the facts existing, one may be presumed to intend the consequence of his acts, this is not an absolutely irrebuttable presumption.

In *Lehigh Coal & Navigation Co. v. United States*, 250 U. S. 356, there was likewise involved a question of good faith, and an offer of evidence tending to prove the claim of good faith. In that case the defendant was indicted, and convicted in the District Court of New Jersey upon an indictment charging a violation of the Elkins Act. From the conviction the defendant appealed to the Circuit Court of Appeals for the Third Circuit, and that Court certified certain questions to this Court. From the certificate, it appears that evidence offered by the defendant in the Court below to prove good faith was first received, but at the close of the trial was stricken out by the Court (p. 362). The certificate of the Circuit Court of Appeals submitted the following questions, upon which that Court asked instructions:

"1. In the criminal prosecution of a shipper for knowingly accepting transportation at less than the duly established rate by receiving an allowance that was referred to in the tariff, but was not specified in figures therein, has the defendant a right to offer in evidence that the allowance was received under the honest belief that it was lawfully established by the tariff, and under the honest belief that, in receiving it, he was not disregarding what he believed to be the provisions of the tariff, but was complying therewith?

"2. Upon the foregoing facts, and in view of the kind and amount of evidence offered upon the subject of good faith, did the district court err in the present case by refusing to submit the question to the jury?"

The Government in that case, as here, contended that the evidence tending to prove good faith was not admissible. This Court answered the first question certified in the affirmative, and held it was unnecessary to answer the second question. In holding it was error to exclude the evidence as to good faith, this Court said (p. 565):

"* * *; here there was compliance or attempted compliance with the statute,—a tariff filed,—and if a question could be raised upon its legal sufficiency the belief of the Company in its legality was supported by high authority, and those circumstances can bring into action and exculpating effect the provision of the statute which requires the acceptance of a rebate to be 'knowingly' done to incur the guilt of a misdemeanor. This conclusion gives no detrimental example against the efficacy of the law."

We submit that the principle of law announced in that case is peculiarly applicable to the case here presented; we earnestly urge that it was error for the Court to exclude the proffered testimony, and that the defendant was entitled to go to the jury not alone on the question of pertinency but upon the entire issue of guilt, and to have the benefit of the proffered evidence.

CONCLUSION.

It is submitted that the conviction of the defendant was erroneous; that the demurrer to the indictment should have been sustained; that the motion of the defendant for a directed verdict was erroneously denied, and that the judgment should be reversed and the cause remanded to the trial court with directions to dismiss the indictment.

Respectfully submitted,

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